(25,192)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 128.

GEORGE A. FULLER COMPANY, PETITIONER,

vs.

OTIS ELEVATOR COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 15, 1917.

Court of Appeals of the District of Columbia

No. 2829.

OTIS ELEVATOR CO., &c., Appellant,
vs.
GEORGE A. FULLER CO., &c.

a Supreme Court of the District of Columbia.

At Law. No. 56467.

GEORGE A. FULLER COMPANY, a Corporation, Plaintiff,
vs.
OTIS ELEVATOR COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed December 18, 1913.

In the Supreme Court of the District of Columbia.

At Law. No. 56467.

GEORGE A. FULLER COMPANY, a Corporation, Plaintiff,
vs.
OTIS ELEVATOR COMPANY, a Corporation, Defendant.

The plaintiff, the George A. Fuller Company, a corporation of the state of New Jersey, sues the defendant, the Otis Elevator Company, a body corporate, with an office in the District of Columbia for the transaction of business and doing business within the said District, for that the plaintiff heretofore, to wit, on the 9th day of August, 1907, and for some time prior thereto as well as thereafter, was en-

gaged in the construction of a certain office building in the city of Washington, District of Columbia, now known and designated as the Hibbs Building, located at 723 Fifteenth street, northwest, for one William B. Hibbs, and in the said building, on the date aforesaid, were certain passenger elevators, theretofore installed by the defendant under an agreement with the said Hibbs, which said elevators, on the date aforesaid, had not been delivered by the defendant to the said Hibbs, but were then, and for a long space of time thereafter, still in the possession, and under the direction and control, of the said defendant and by it, on the said date, as well before as after, operated for the carriage of passengers and materials and to do other work for hire, and on the date aforesaid, as well before as after, the plaintiff hired the defendant to operate one of the said elevators for the use and benefit of the plaintiff, and of other persons law-
2 fully in the said building, and agreed to pay the defendant and did pay the sum of three dollars per day for the said service, and the defendant, its agent or servant did so operate it, as aforesaid, and it then and there became and was the duty of the said defendant, its agents and employees, to operate the said elevator with care, but the plaintiff says, that on the date aforesaid, one, Wilson A. McCloskey, a painter in the employ of the Robert E. Mackay Company of New York city, and not in the employ of the plaintiff, was lawfully on the top of said elevator so operated by the defendant and being on the said elevator as aforesaid and desiring to go up thereon from the first floor to the second floor for the purpose of getting off the said elevator, he, the said McCloskey, directed the said defendant, its agent or employee, so controlling and operating the said elevator, to stop it at the second floor, but the said defendant, its agent or employee, in violation of the duty of the said defendant as aforesaid, did so carelessly and negligently operate the said elevator that it was caused to go above and beyond the second floor, carrying the said McCloskey with it, and the foot of the said McCloskey was caused to come into contact with certain counterbalance-weights, which formed a part of the equipment of the said elevator, and was injured and the said Wilson A. McCloskey thereupon brought suit against the plaintiff, in the Supreme Court of the District of Columbia, for the injuries so received by him, said suit being Law No. 50782, and recovered a verdict and judgment against plaintiff, on October 19th, 1909, for Fifty-four hundred and twenty-five dollars ($5,425.00) and costs, from which judgment plaintiff appealed to the Court of Appeals of the District of Columbia and thereafter, to wit, on November 1, 1910, the said judgment was affirmed by said Court
3 of Appeals; and thereupon the plaintiff sued out a writ of error to the Supreme Court of the United States, on the said judgment of the said Court of Appeals and thereafter, to wit, on April 7th, 1913, said Supreme Court of the United States affirmed the said judgment, and on, to wit, May 5th, 1913, the plaintiff, because of said judgment, was caused to pay to the said Wilson A. McCloskey, the sum of Sixty-six hundred and twenty-eight dollars and sixty cents ($6,628.60), in satisfaction of the said judgment with interest to said date of payment; and further, the plaintiff, on account of

its said appeal to the Court of Appeals, as aforesaid, was caused to expend court costs in the sum of $114.50, and on account of the writ of error to the Supreme Court of the United States, as aforesaid, was caused to expend court costs in the sum of $94.85, of all of which the defendant had due notice, but, although often demanded, the defendant has not, nor has any one for it, paid the plaintiff the said sums, nor any part thereof, whereby and by reason whereof, the defendant became, and was, and is now, liable over to the plaintiff in the full sum of Sixty-eight hundred and thirty-seven dollars and ninety-five cents, ($6,837.95), and the plaintiff brings this suit and says that by the said negligent acts and defaults of the said defendant, the plaintiff has been damaged in the sum of Sixty-eight hundred and thirty-seven dollars and ninety-five cents ($6,837.95), and the plaintiff claims the said sum of $6,837.95, with interest thereon from May 5th, 1913, besides costs of this suit.

EDWARD S. DUVALL, JR.,
Attorney for Plaintiff.

4 *Pleas.*

Filed January 12, 1914.

* * * * * * *

I.

Now comes the defendant and for plea to the declaration filed by the plaintiff in the above entitled cause says that it is not guilty as therein alleged.

II.

And for a further and second plea to said declaration, the defendant says that it did not undertake and promise as therein alleged.

III.

And for a further and third plea to said declaration, the defendant says that the plaintiff ought not to have or maintain this suit for that its alleged cause of action did not accrue within three years next before the filing of this suit.

IV.

And for a further and fourth plea to said declaration, the defendant says that in the action at law therein mentioned,—namely, action at law No. 50,782, in the Supreme Court of the District of Columbia, wherein Wilson A. McCloskey was plaintiff and the George A. Fuller Company, hereinafter referred to as the Fuller Company, was one of the defendants,—the defendant in this cause, the Otis Elevator Company, hereinafter referred to as the Elevator Company, was joined as a co-defendant with said Fuller Company, the said McCloskey alleging in the declaration filed by him in said action at law that the injury received by him as therein described was "due to the care-

lessness, recklessness and negligence of the defendants", to wit, the said Fuller Company and said Elevator Company.

To the declaration filed by McCloskey in said action at law, the Fuller Company and the Elevator Company filed separate pleas, each denying that it was guilty as alleged, and the said Fuller Company and Elevator Company thereupon became and were adversary parties in said action at law.

The issues joined on said separate pleas were duly tried in the Supreme Court of the District of Columbia, before a jury, on or about October 12 to 19, 1909, and the situation of the parties and the evidence offered at such trial were summarized in the opinions of the Court of Appeals of the District of Columbia and of the Supreme Court of the United States, subsequently rendered in the cause, as follows:

"This action was brought by Wilson A. McCloskey, the defendant in error, to recover damages for personal injuries caused by alleged negligence in the operation of an elevator in the Hibbs Building in this District. At the time of the accident McCloskey, who will be called the plaintiff, was engaged in painting the elevator shaft and for this purpose was riding on top of the elevator. The action was brought against the Otis Elevator Company, and the plaintiff in error, George A. Fuller Company. Without objection, a verdict was directed in favor of the Otis Elevator Company, but the case against the George A. Fuller Company was submitted to the jury who found a verdict in favor of the plaintiff. The judgment on this verdict was affirmed by the Court of Appeals of the District and the case comes here on writ of error. 35 App. D. C. 595.

"The facts appearing upon the trial are succinctly stated in the opinion of the court below, in which the George A. Fuller Company is described as the defendant, as follows:

" 'The defendant company contracted with William B. Hibbs to erect for him an office building on 15th Street in this city. The work was to be completed by a time certain. This contract did not include the installation of an elevator. That work was provided for in a contract between Hibbs and the Otis Elevator Company. The elevator company installed its elevator long before the completion of the building. This elevator, down to the time of the injury to the plaintiff, had not been turned over to the owner of the building, but was operated by an employe of the Otis Company, who was paid and generally controlled by that company. After its installation the defendant company entered into an agreement with the elevator company by which it became entitled to use this elevator in the

6 prosecution of its work, paying to the elevator company three dollars per day, which was to cover the wages of the caretaker or operator aforesaid, the Otis Company reserving the primary right to use the elevator. Under this arrangement the defendant company was to have no control over the elevator operator other than to notify him when to start and when to stop his machine.

" 'The defendant company entered into a subcontract with the Robert E. Mackay Company of New York for the painting required by its contract with Mr. Hibbs. The plaintiff was an employee of

the Mackay Company. The elevator shaft was included in this subcontract. To paint this it was of course necessary that some means be provided whereby workmen could ascend and descend the shaft. Therefore the Mackay Company entered into an agreement with the defendant company by which the defendant company agreed to furnish the Mackay Company, for use in painting said shaft elevator, power and operator at any time that the elevator company or the defendant company did not want them. Nothing whatever was said about the arrangement between the elevator company and the defendant company, the agreement between the Mackay and the defendant company proceeding upon the theory that the equipment and elevator were under the control of the defendant company. The Mackay Company was not to have, and in fact did not have, any control over the operator other than to direct him when to start and when to stop his elevator while thus temporarily used as a movable staging.

" 'Upon the day of the accident plaintiff and another workman were on the roof of the elevator touching up the walls of the shaft. They had worked down until the floor of the car was on a level with the first floor of the building. To finish the walls of the shaft between the first and second floors of the building, the space then occupied by the body of the car, it became necessary to get under the car. To do this it was necessary for the painters to be taken to the next or second floor landing. The plaintiff was standing on the rim or ledge around the top of the car and facing the centre of the car. He had a paint box and brush in his hands. The other painter was on another side of the top with his back to the plaintiff. This rim or ledge was about six and one-half inches wide. Plaintiff called to the elevator operator to take him and the other painter up to the second floor and let them off there. There was evidence before the jury that when the car had reached a point where plaintiff had directed that it be stopped, the car paused and suddenly started again, throwing plaintiff off his balance, which he was unable to regain until the car has reached the fifth floor, where he was caught in the weights which passed the car at that point.' "

Upon the foregoing evidence, counsel for the Elevator Company at said trial moved the Court to direct a verdict in favor of said Elevator Company upon the ground that the elevator operator, whose negligence it was alleged caused the accident, was at
7 the time of the said accident in the special service of the Fuller Company and not then under the control of the Elevator Company. After argument said motion was granted, whereupon on or about October 13, 1909, a verdict was directed by the Court in favor of the Elevator Company and neither said McCloskey nor the Fuller Company took any exception or made any objection to said action of the Court.

On or about October 20, 1909, a final judgment was rendered upon said verdict in favor of the Elevator Company in the words and figures following, to wit:

"It appearing that under the Rule of Court, judgment on verdict should be entered herein in favor of the Otis Elevator Company, one

of the defendants, it is so ordered. Wherefore, it is considered that the plaintiff herein take nothing against said defendant Otis Elevator Company, that said defendant go hereof without day, be for nothing held, and recover of plaintiff its costs of defense to be taxed by the clerk, and have execution thereof."

Neither said McCloskey nor said Fuller Company has ever appealed from said judgment or made any effort to have same reviewed and said judgment now remains in full force and effect, not in the least reversed or made void.

On or about October 19, 1909, a verdict was rendered in said action at law No. 50,782 in favor of the plaintiff McCloskey against the Fuller Company in the sum of $5,425, with interest and costs, as alleged in said Fuller Company's declaration herein, and on appeal to the Court of Appeals of the District of Columbia by said Fuller Company, the judgment entered upon said verdict was affirmed on or about November 1, 1910, (35 App. D. C. 595), and on writ of error to the Supreme Court of the United States was affirmed by that Court on or about April 7, 1913, (228 U. S. 194). Both of said appellate Courts expressly referred to and approved of the action of the trial Court in directing a verdict in favor
8 of the Elevator Company, the Supreme Court of the United States saying:

"It is urged that there is no sufficient averment of the negligence of this company (Fuller Company) and attention is directed to the allegation of the declaration that the plaintiff 'requested the said defendant, Otis Elevator Company, its servants and employes to stop said elevator at the second floor, so that he might get off and alight therefrom.' It is manifest, however, from the other allegations of the declaration that the plaintiff intended to charge, and did charge, negligence on the part of both defendants.

* * * * * * *

"The principal argument for reversal is based on the ruling of the trial court that Locke, the operator of the elevator, was the servant of the Fuller Company. The court below approved this ruling and we find no error in its conclusion. So far as Locke's employment was concerned, there was no dispute as to any matter of fact and the question of the liability of the Fuller Company for his negligence, if he was negligent in the operation of the elevator, was one of law. It cannot be said that, under the arrangement between the Fuller Company and the Mackay Company, Locke was transferred to the employment of the latter.

* * * * * * *

"It must be concluded that the operating of the elevator under this arrangement with the Mackay Company was an operating of it by the Fuller Company.

* * * * * * *

"In the present case, the Fuller Company obtained the use of the elevator, and the operator, from the Otis Company, and paid therefor. But the Otis Company had nothing to do with the arrangement with the Mackay Company. To this transaction, and to the

employing of the top of the elevator as a movable platform for the painters, the Otis Company was a stranger. The Fuller Company, having obtained the use of the elevator, agreed to supply it to the Mackay Company and undertook to furnish that company the necessary service in operating it; it asserted control for this purpose, and assumed the duty of operating with proper care."

Wherefore by reason of the foregoing, as will more fully appear by reference to the record of the proceedings and judgments in said action at law No. 50,782, which is hereby referred to and made a part hereof, the defendant Elevator Company says that the plaintiff, the George A. Fuller Company, ought not to have or to maintain its alleged cause of action in its said declaration set forth.

McKENNEY, FLANNERY & HITZ,
Attorneys for Defendant,
Otis Elevator Company.

9 *Plaintiff's Joinders of Issue and Replication.*

Filed January 22, 1914.

* * * * * * *

1. The plaintiff joins issue upon the defendant's first plea.
2. The plaintiff joins issue upon the defendant's second plea.
3. The plaintiff joins issue upon the defendant's third plea.
4. For reply to the defendant's fourth plea, the plaintiff says that in the said suit at law No. 50,782, in the Supreme Court of the District of Columbia, wherein the plaintiff and the defendant herein were co-defendants, the court did not conclusively adjudge as between the co-defendants, that the elevator operator, whose negligence caused the accident for which a recovery was had by the plaintiff in said suit, was at the time of the said accident in the special service of the Fuller Company (plaintiff herein), and not then under the control of the Elevator Company (defendant herein), as in said fourth plea alleged.

EDWARD S. DUVALL, JR.,
Attorney for Plaintiff.

Defendant's Joinder of Issue.

Filed January 26, 1914.

* * * * * * *

The defendant joins issue upon the plaintiff's replication to the defendant's fourth plea.

McKENNEY, FLANNERY & HITZ,
Attorneys for Defendant.

10 *Memoranda.*

March 9, 1915.—Jury sworn and respited.
March 10, 1915.—Verdict for Plaintiff for $6,837.95 and interest from May 5, 1913.
March 11, 1915.—Motion for a New Trial filed.

Supreme Court of the District of Columbia.

SATURDAY, March 20th, 1915.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice presiding.

* * * * * * *

Upon consideration of the motion for a new trial filed herein, it is ordered that said motion be, and the same is hereby overruled and that judgment on verdict be entered. Wherefore, it is considered, that the plaintiff herein recover of the defendant, the sum of Six Thousand Eight Hundred Thirty-seven and 95/100 dollars ($6,837.95) with interest from May 5th 1913, together with costs of suit to be taxed by the clerk and have execution thereof.

From the foregoing, the defendant by its attorney Mr. Flannery, now in open court, notes an appeal to the Court of Appeals; whereupon, the penalty of a bond to operate as a supersedeas, is hereby fixed in the sum of Nine Thousand dollars.

11 *Memoranda.*

April 5, 1915.—Appeal bond approved and filed.

April 23, 1915.—Time to submit Bill of Exceptions extended to May 17, 1915, inclusive, and to file transcript of record to May 31, 1915, inclusive.

Supreme Court of the District of Columbia.

FRIDAY, May 7th, 1915.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice presiding.

* * * * * * *

Come now the parties hereto by their respective attorneys of record and thereupon the Bill of Exceptions taken at the trial of this cause is submitted to the Court by defendant's attorneys and prayed to be signed and made of record nunc pro tunc, which is now hereby accordingly done.

Assignments of Error.

Filed May 12, 1915.

* * * * * * *

Now comes the defendant in the above entitled cause and, in connection with its appeal from the judgment rendered against it herein, assigns the following errors committed in the trial of said cause, upon which it relies to reverse said judgment:

The trial court erred:

1. In permitting plaintiff to give evidence of elevator service fur-

nished by the defendant on other buildings than the one involved in this suit.

12 2. In refusing to instruct the jury to return a verdict for the defendant.

3. In denying the defense of res judicata set up by the defendant's plea and motion.

4. In holding that the issue of fact as to the service in which Locke, the elevator operator, was engaged at the time of the accident and the question of law arising therefrom, had not been examined and determined in favor of the defendant by the Supreme Court of the District of Columbia, the Court of Appeals and the Supreme Court of the United States in the original case of Wilson A. McCloskey vs. George A. Fuller Company and Otis Elevator Company, at law, No. 50,782, in the Supreme Court of the District of Columbia.

5. In refusing to hold that the plaintiff was estopped by its attitude in said original case, and the admissions contained in its brief on appeal therein, from contending that said Locke had not been turned over to the plaintiff by the defendant and had not become the plaintiff's servant for the time being.

6. In submitting to the jury for determination as a question of fact, the question of law whether, at the time of the accident, and under the arrangement which the undisputed evidence showed existed between the plaintiff and the defendant companies, Locke was the servant and agent of the defendant.

7. In instructing the jury that, as between the plaintiff and defendant in the case at bar, the question of the agency of Locke was entirely different from the question of agency that was decided in said original case.

13 8. In submitting to the jury under the pleadings and evidence in the instant case, the question whether or not Locke was guilty of negligence.

McKENNEY & FLANNERY,
Attorneys for Defendant and Appellant.

Designation of Record.

Filed May 12, 1915.

* * * * * * *

To the Clerk of the Supreme Court of the District of Columbia:

Please prepare the transcript of record on appeal in this cause, and include therein the following, to wit:

1. Declaration;
2. Defendant's pleas;
3. Plaintiff's Joinders of issue and replication; Defendant's joinder of issue;
4. Memorandum of trial and verdict;
5. Memorandum of filing and overruling motion for a new trial;

6. Judgment on verdict;
7. Appeal taken in open court and memorandum of appeal bond;
8. Memorandum of order extending time for submission of bill of exceptions and filing transcript of record;
9. Bill of exceptions;
10. Assignments of error;
11. This designation.

McKENNEY & FLANNERY,
Attorneys for Defendant and Appellant.

14 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 13, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 56467 at Law, wherein George A. Fuller Company, a corporation, is Plaintiff and Otis Elevator Company, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 17th day of May, 1915.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

15 In the Supreme Court of the District of Columbia.

At Law. No. 56467.

GEORGE A. FULLER COMPANY
vs.
OTIS ELEVATOR COMPANY.

Bill of Exceptions.

Be it remembered that the above entitled cause came on for trial before Mr. Justice Stafford and a jury on, to wit, March 9, 1915, and thereupon the plaintiff to maintain the issues on its part joined, gave evidence tending to prove as follows:

JAMES BAIRD testified that he was Vice-President of the George A. Fuller Company, which was engaged in the construction of office buildings, residences and other large buildings, and had been such officer about six years, and in 1906 and 1907 he was the manager of that company in Washington, D. C., and before that he was esti-

mator and superintendent for the company in New York and Boston; that said company constructed office buildings, residences and general large buildings and constructed the Hibbs Building on Fifteenth Street, Washington, D. C., for Mr. Hibbs; that the Fuller Company did not have anything to do with the construction and installation of the passenger elevators; that the elevators in this building were constructed by the Otis Elevator Company under a separate contract with the owner of the building; that the building was started about October, 1906, and was finished about September 1907, when most of the tenants moved in; in July and August 1907 they were finishing up miscellaneous odds and ends, touching up, painting, tile work and plastering; that their (Fuller Company) contract covered the painting work which they sublet to the Robert E. Mackay Company of New York; that the work of the Mackay Company included painting the elevator shaft; that the hod lifts were taken down in June or July and after that there was need
16 for elevator service inside of the building and the only elevators in there were those installed by the Otis Company; the elevator service was required in the painting of the shafts; during July and August, 1907, the plaintiff employed the defendant to give them elevator service in winding up the odds and ends on the building; the defendant supplied the elevator service for the different mechanics who were working throughout the building at that time to take up small amounts of plaster, tiles or woodwork, or in this particular case to allow the Mackay Company to paint the shaft, using the elevator as a travelling platform, and for miscellaneous service that is given by an elevator at that stage of the building, universally; that they had always employed the Otis Elevator Company to do similar work before this occasion where the latter supplied the elevators for the building; that they had previously similarly employed the Otis Company on other buildings in this City—in the Munsey Building and Union Trust Building, they installed the elevators and on finishing the odds and ends of jobs supplied us with what is called a temporary service, in fact, wherever they install elevator service they do it for us; the defendant furnished everything, the elevator, the man, the oil and grease, and fixing up a machine that gets out of order; and the bills usually come in, and you cannot just tell what they will be until you get your bill after it is all finished, covering the whole expense of running it; for instance, if the machine was broken while in this service they would charge for fixing it up, as a part of their bill for service; the service included everything that might occur while they were giving it; it was indefinite.

And thereupon the said witness was asked the following question and made the following reply:

"Q. Did they supply the elevator service for the painting of the elevator shaft in those buildings? A. Yes."

To which question and answer counsel for the defendant then and there objected, and the Court sustained the objection; whereupon said witness was asked the question and made answer as follows:

17 "Q. Was there any written contract between you and the Otis Elevator Company covering this work they were to do? A. There was no written agreement.

"Q. Was there any special agreement? A. Nothing other than our customary arrangement."

And thereupon the Court admitted the first quoted question and answer, as to what was done on other buildings over the objection of counsel for defendant, to which ruling counsel excepted and said exception was allowed by the Court:

Thereupon said witness further testified that for this work—this service—they received a bill in this particular case for the wages of their (Otis') man Locke, and witness noticed that some fuses were charged and that there was a charge for grease and there were miscellaneous items that went into the cost of service of the elevators while they were in this use; that they had no idea what they would be at the time they started; that they employed the Otis Company to do this work instead of doing it themselves because this work was in their line and not in the plaintiff's; that the operator Locke had never worked for the Fuller Company so far as he knew and he would have known if he had; that they never employed that character of mechanics; that so far as his recollection goes or their records show no word passed between the plaintiff company and any representative of the Otis Company as to this particular arrangement in the Hibbs Building for this elevator, it just went on the customary arangement; that when the employees of the Otis Company on the Hibbs Building were not doing this work for the Fuller Company, they were installing the elevators; at various times said defendant had as many as four or five men there at one time and when the elevator was not being used by them either for themselves or in doing this work for the Fuller Company, the defendant took care of the elevators; the Fuller Company never bought any of the accessories mentioned nor anything in connection with the elevator; that when the Fuller Company arranged for or secured the service of the elevator from the elevator contractor, they had no

18 idea how much was involved, and it is the general custom to supply the same service to the sub-contractors as they come and call for it; the sub-contractors might want service for half an hour or for half a day, and while the elevator is not in use, of course there is no fee being secured for it to pay the charges from the Otis Elevator Company; so that it has become the custom to charge at the rate of a dollar an hour while the elevator is in use; a man may use it for only 10 minutes or for only an hour; and so the idea is to arrive as best we can at what is a fair charge for the use of the elevator, and what is our probable cost for that is a very greatly variable item; that Frank J. Fisher was superintendent at the Hibbs Building for the Fuller Company in charge of doing the finishing work and his duty was to see that the odds and ends were finished as rapidly as possible, to direct what work should be done under the contracts of the sub-contractors and give general directions and look after the items and see that they were taken care of; that the only authority which he had to direct or control any of the em-

ployees of sub-contractors or of the defendant Otis Company, was to show them what particular work was to be done at the time, and see they did properly the work that they were under an obligation to do.

And thereupon counsel for defendant admitted that no part of the sums sued for had been paid.

On cross examination said witness testified that the Fuller Company had paid, without objection, the following bill rendered by the Otis Company which appears in the record in the case of Wilson A. McCloskey vs. the George A. Fuller Company, et al., No. 2153, April Term, 1910, of the Court of Appeals of the District of Columbia, page 22, and that the Fuller Company had received payment for the following bill rendered by it against the Robert E. Mackay Company, which appears in said record at page 35:

19 "PHILADELPHIA, August 14, 1907.

Geo. A. Fuller Company, Munsey Building, Washington, D. C.

'Hibbs Building.'

To Otis Elevator Company, Dr.

F-2072.	One man to take care of elevator and operate sameduring month of July:	
	26 days at $3.00 for 8 hour day.....	$78.00
Overtime:	27 hrs. " $6.00 " " " "	20.25
		$98.25
F-2148.	One man to take care of elevator and operate same during month of July:	
	9 days at $3.00 for 8 hour day.....	$27.00
	6½ hours at $3.00 for 8 hour day.....	2.34
Overtime:	½ " a day for 9 days at $6 per day.	3.38
		$32.72
F-1976.	18 75 Amp. Noark Fuses 250 volts.	
	12 Reg. #F 7794 F-1 Noark Fuses.	
	25# Elevator Grease.	
	18 Lubricating candles.	
	2# Waste	$19.75
		$150.72

44 *Report of Time on Hibbs Building (July).*

July	1	9	hours.	July	15	9	hours.
"	2	9	"	"	16	9	"
"	3	10	"	"	17	9	"
"	5	9	"	"	18	9	"
"	6	9	"	"	19	9	"
"	8	9	"	"	20	9	"
"	9	9	"	"	22	9	"
"	10	9	"	"	23	9	"
"	11	9	"	"	24	9	"
"	12	9	"	"	25	9	"
"	13	9	"	"	26	9	"
				"	27	9	"
				"	29	9	"
				"	30	9	"
				"	31	9	"

Report of Time on Hibbs Building (August).

August	1	9	hours.
"	2	9	"
"	3	9	"
"	5	9	"
"	6	9	"
"	7	9	"
"	8	9	"
"	9	9	"
"	10	9	"
"	12	1½	hrs.
"	13	1	"
"	14	3¾	"

20 "WASHINGTON, D. C., Aug. 19, 1907.

Robert E. Mackay Co., New York City.

19—.

To George A. Fuller Company, Dr., Building Construction, Munsey Building:

Hibbs Building.

All claims for errors must be made within five days. For use of electric elevator in painting elevator shaft and tracks.

July 29.	4	hrs.	at $1		$4.00
Aug. 3.	1	"	" "		1.00
" 5.	6	"	" "		6.00
" 7.	5	"	" "	Chgd	5.00
" 8.	6	"	" "		6.00
" 9.	3	"	" "		3.00
					$25.00"

Said witness further testified on cross examination that Minte, the foreman of the Mackay Company, came to him and asked for elevator service for painting the shaft and witness told him it would be all right, he could have it. Thereupon occurred the following question and answer:

"Q. You dealt with him on the basis that you had the elevator and the man, and turned it over to him, did you not? A. I can't say that I gave any particular consideration to that condition. It was simply I knew that at the end of the job they always had elevator service, and it was for the purpose of completing the building, and he needed it for the painting of the shaft, and I told him it was all right and he could have it."

Said witness further testified that he assumed that the Otis Company was giving them the elevator service for the completion of the building, and one of the sub-contractors asked for it and he gave it to him. Thereupon said witness further testified:

"Q. You turned over the elevator to him and turned over the man, did you not? A. I do not think we did. I think that the service was turned over to him.

"Q. Did you testify on the trial of the case of McCloskey
21 against the George A. Fuller Company, in reference to your conversation with Mr. Minte and what you did, as follows:

" 'Q. Please state what the conversation was? A. It was not much at length. As I recall, he called at my office and stated that he wanted to have the use of the elevator at times, and wanted to know how he could arrange it. I simply told him he would have the use of it under the customary arrangements and whenever he wanted to use the elevators, if the Otis Elevator Company and ourselves were not using them he could have the use of them for any purpose he might desire, and we would charge him the customary rate.

" 'Q. What was that? A. I think we had rented the elevators to Mackay before at $1 an hour, the customary rate.

" 'Q. Was anything said between you and Minte on that occasion with relation to doing the work of hoisting the elevators up and down? A. Nothing whatever.

" 'Q. What was the talk directed to? A. He simply came to me and asked for the use of the elevators, and I told him that he could have it.

" 'Q. Did that also include the operator? A. It included everything.

" 'Q. That is, you were to lend the elevator and the operator to the Mackay Company? A. Yes; he had everything that went with the elevator.' "

"Q. Did you so testify at that trial? A. I think so. That is practically what I mean to say now, that he had complete service of the elevator.

"Q. That you turned over the car to him and turned over the operator to the Mackay Company?

"Mr. DUVALL: The witness did not say that.

"Mr. FLANNERY: Wait a minute. This is cross-examination and I am asking him if he said that.

"By Mr. FLANNERY:

"Q. It is a fact, is it not, that you turned over the car to him and turned over the elevator operator to him? A. The idea is——

"Q. No, never mind the idea. I want the fact, please. That is the fact, is it not? A. The fact is just the same now as it was then.

"Q. Yes. A. That is, that he was to have complete service for painting that shaft while the Otis Elevator Company and our company were not using the car.

22 "Q. In other words, you took this car which belonged to the Otis Elevator Company and you turned the car and you turned the elevator operator which you had hired from the Otis Elevator Company, over to the Robert E. Mackay Company, did you not? A. I did not understand that we hired the man, at all, Mr. Flannery. The bill does not show that. The bill shows that——

"Q. Just a moment. Can you not answer that question? A. That is what I am trying to do.

"Q. I am simply asking you if you did not take the car which belonged to the Otis Elevator Company and the man that you hired from the Otis Elevator Company, and turn the car and the man over to the Robert E. Mackay Company? A. Well, it depends upon what you mean by that.

"Q. Is not that what you testified at the trial of the case of McCloskey against the George A. Fuller Company, as I have read it to you? A. Yes.

"The COURT: What are you reading from?

"Mr. FLANNERY: I am reading from page 49 of the record of that case.

"The COURT: He has stated that is what he said, as you read it to him".

Said witness further testified that the Fuller Company had no elevator operators of its own; that that is one of the conditions the Otis Company insists on having and that is that the car and the entire equipment be in their charge, and that one of their men run it; that the Otis Company would not allow their cars to be operated except by their own experienced men.

And thereupon on redirect examination said witness was asked the following question and made the following reply:

"Q. About this bill that Mr. Flannery has questioned you concerning, what if any consideration did you give to that part of the bill which refers to the operator, one man to take care of elevator and operate the same? A. We have a great many bills come across our desk, and of course I do not personally pass on the bills

23 as to the amount of service given, or anything of that kind. The bill when it comes to us is simply referred to the man on the job. He checks up the time and he in turn turns the bill over to our cashier, who, if the time is O. K. or the items are O. K., draws

a check for it and lays it on my desk. I see that the bill is properly O. K.'d, and sign the check; and I do not give any particular consideration to the bill except to see that it is properly O. K.'d.

To which counsel for the defendant objected but the Court overruled said objection, whereupon counsel for the defendant duly excepted and said exception was allowed by the Court.

And thereupon the witness testified on further redirect examination, as follows:

"Q. Do you recall ever paying any attention to that part of the bill when you signed the check for it?

"Mr. FLANNERY: I object to that.

"A. I would pay no attention to it itself, the technical meaning of the bill.

"The COURT: To the language in which *is* was couched. Did you pay attention to the way the charge was made.

"WITNESS: *A*. Not the least."

And thereupon said witness on further redirect examination testified as follows:

"Q. What did you do to get the elevator service from the Otis Elevator Company? A. We simply relied on the custom——

"The COURT: No, not what you relied on. What did you do?

"The WITNESS: We did nothing.

"Mr. DUVALL: You must have done something in regard to the Otis Elevator Company, to let them know that you wanted your company to have that service.

"The WITNESS: Our superintendent, whenever we wanted their service, simply notified the Otis Elevator Company to give it, but there was no direct contract for it so far as our actions went.

"The COURT: To what man was that notice given?

24 "The WITNESS: Mr. Fisher was told——

"The COURT: He told whom?

"The WITNESS: I told him——

"The COURT: No; Mr. Fisher represented your company. To whom did he give the notice that he wanted the elevator?

"The WITNESS: I could not tell that.

"The COURT: You do not know?

"The WITNESS: No, sir."

And said witness on re-cross examination further testified as follows:

"Q. While the elevator was being used on your own work or being used by your sub-contractor, did the Otis Elevator Company make any use of it during those hours that you were using it or your sub-contractors were using it? A. They had control of it.

"The COURT: Did they make actual use of it during the hours when you were using it or your sub-contractors were using it?

"The WITNESS: Sometimes they would. That is, whenever they wanted the use of it they took the use of it from us, and our sub-

contractors, or ourselves, would give it up. We could not both be using it at the same time.

"By Mr. FLANNERY:

"Q. That is what I mean. You could not both be using it at the same time? A. No, but it was always understood that it was in their charge.

"Q. In their general charge? You would surrender it back to them whenever they wanted it for their purposes, would you not? A. That is during the use of it, Mr. Flannery.

25 "The COURT: That is perfectly clear, I think. They interrupted your use of it?

"The WITNESS: Whenever they pleased, yes."

"(By Mr. FLANNERY:)

"Q. But during the hours or half hours or whatever periods of time it was that you were using it or your subcontractors were using it, they did not use it; that is true, is it not? A. No, it is not true. On the contrary, if we were using it, even for painting the shaft, and they wanted to make a hoist or wanted to adjust some part, our men would stop while they used it."

On redirect the witness further testified that when the Otis Company wanted to do some other work with their elevator they would not consult him, they would consult the superintendent of the Fuller Company on the job; that he would understand that they (Otis) had the use of it whenever they pleased.

FRANCIS J. FISHER testified that he was the assistant superintendent of the George A. Fuller Company employed at Cleveland, Ohio; that on August 9th, 1907, he was employed on the Hibbs Building for said Company and had been so employed from about two months after the building was started and continued on the job about eight months; that on August 9, 1907, he had charge of the building and they were finishing up the building, doing patching of plastering, painting, finishing the mill work, sending down rubbish and general finishing of the building; that during July and August

26 the Robert E. Mackay Company was engaged in painting the elevator shaft, and in doing that work the Otis Company gave them the service of the elevators; that he thinks he (witness) notified the Otis Company that the service was needed in the Hibbs Building for that purpose but did not recall the date; that they had been using it for the best part of two months prior to the 9th of August; that he does not know whom he notified; he called up the Otis Elevator Company and asked them to allow service in that building and they furnished us the service; that at that time the Otis Elevator Company was installing the elevators for itself and off and on had from two to four men there installing the machinery, putting in the cars, fixing cables and getting things ready for operation; that the two elevators were temporarily in running condition in July and August, 1907; that the Otis Company was operating the

elevators for the painters in painting the elevator shaft off and on about four weeks during July and part of August; on the 9th of August they were operating the elevator for the painters in painting the elevator shaft and the painters were then painting in the east elevator shaft; that a man named Locke was operating the elevator in the Hibbs Building at the time of the accident to Wilson A. McCloskey on August 9th.

And thereupon said witness further testified:

"Q. Was he in the employ of the George A. Fuller Company? A. No, sir.

"Mr. FLANNERY: I object to that because it raises a legal question.

27 "The COURT: That, so far as it is a legal question, will not be considered in.

"Mr. FLANNERY: Yes.

"The COURT: But as indicated before, so far as it relates to any other employment——

"Mr. DUVALL: I am going into further details later on that question.

"The COURT: It will not be affected by the answer so far as the law is concerned."

And thereupon said witness further testified that he kept a time book with the names of all the people employed by the Fuller Company and he never put Locke's name in it; during July and August when the Otis Company was not doing any work for the Fuller Company, when the elevators were not in use, the Otis Company were finishing up their work; that the elevators had not been accepted by the owner of the building at that time; that the defendant, at times when not doing any work for the Fuller Company was running the elevators to test them and see that they worked properly; that there was always an Otis Company representative

28 on the job. Thereupon said witness further testified as follows:

"(By Mr. DUVALL:)

"Q. Did you ever see this representative around there during this period of time when you say that the elevators were being operated to assist the painters in painting the elevator shaft? A. I should say he was there constantly, and had complete charge of the elevators. He would be the representative of the Otis Elevator Company.

"Q. And could any one working in and around that building see the painters while they were at work on the top of the elevators? A. Yes, they could.

"Q. What, if any, direction or control over Locke did you assume? A. I did not assume any control over him, only to see that he performed the duties that he was sent there to do.

"Q. What did you do in so far as your relations with Locke were

concerned? A. Well, as a representative of the Otis Elevator Company I would tell him what was to be done.

"Q. And then would you allow him to do it in his own way? A. Yes, sir.

"Q. For instance, when the painters said that they were ready to paint the elevator shaft, what did you do? A. I notified him that the painters would use the elevator.

"Q. Did you make any arrangement with the Otis Elevator Company for this elevator service? A. No, sir.

"Q. As I understand it, then, all you did was to notify them when you wanted it? A. That is all.

"Q. Do you know whether there were any tenants in that building prior to August 9, 1907? A. I think there were.

"Q. Do you know what part of the building their offices
29 were in? A. As near as I can recall, up around the 8th or 9th floors."

On cross-examination said witness said that he notified the Otis Elevator Company when the Fuller Company w[illegible] to use the service; that he had testified at the trial of Wils[illegible] A. McCloskey vs. the George A. Fuller Company, the original [illegible] case, and thereupon further testified:

"(By Mr. FLANNERY:)

"Q. Did you say anything at that trial about notifying the Otis Elevator Company whenever you wanted to use the elevator service? A. I don't recollect that I notified them every time we wanted to use the service, no, sir.

"Q. As a matter of fact you notified them, did you not, when you wanted to use the elevator, and the man who ran the elevator? A. Which at that time I intended to convey the meaning of all the service.

"Q. That is, the car, the man and the—— A. Everything in connection with it.

"Q. Everything in connection with running the elevator, lubricating oil and everything of that kind? A. Yes, sir.

"Q. And whenever your sub-contractors wanted to use the elevator for a travelling stage, or any other purpose, you notified the operator to allow them to do it, did you not? A. What was that, again?

"Q. I say as a matter of fact whenever your sub-contractors, for instance like the Mackay Company, wanted to make use of the elevator, you notified the operator to let them do it, did you not? A. As a representative of the Otis Elevator Company, yes, sir; I notified them that that was what we wanted them to do that day.

"Q. You notified this operator? A. Who was representing the Otis Elevator Company, yes, sir.

"Q. Just a minute, please. This man was sent by the Otis people to operate this elevator for your purposes, was he not? A. He was the man that the Otis Elevator Company sent there to do
30 our work, yes, sir.

"Q. And when he was doing your work he was not doing

any work for the Otis Elevator Company, was he? A. Not Locke himself.

"Q. And when he was doing your work he was subject to your orders, was he not? A. In so far as what I saw he was sent there to do.

"Q. That was simply to run the elevator up and down, was it not? A. Yes, sir."

Said witness further testified on cross examination that when he instructed Locke to allow the Robert E. Mackay Company to use the elevator on the 9th of August, 1907, he gave him no special directions; that he testified at the trial of McCloskey vs. Fuller that "he had told Locke that he must receive his orders from the Robert E. Mackay Company or Minte, its foreman or the latter's representative;" that while the elevator was being used by the Mackay Company Locke took his signals when to go up and when to go down, from Minte, the foreman of that Company; that this painting of the shaft was a part of the contract of the Fuller Company; that whenever the Fuller Company had not been using the elevator for three or four days and wanted to start the service again, he would call up the Otis Company by telephone at its Washington office on Fifteenth Street and ask them to supply that service to them and he would do that whether they wanted it for their own purposes or for their sub-contractors; and the Otis Company would keep an account of the time they were using the elevator and charge for it.

On redirect examination said witness testified that the Otis Company had a couple of men at the building all of the time, maintained as a working force in connection with the elevators, whether the elevators were being used for the work of the Fuller Company or not; there were two elevators and they were there working on one or the other. Thereupon said witness further testified:

"Q. Did you exercise any more supervision or control over
31 that one man, Locke, than you would over any other elevator man in any public building? A. No, only to see that he did what he was sent there to do."

Said witness further testified on redirect examination that the Otis Elevator Company's elevators were doing other work for the Fuller Company besides this painting work on the shaft, the elevators were supplying general service there in finishing up the building—including the hoisting of material and taking down rubbish, etc.; that whenever the Otis Company was doing work for the Fuller Company no passengers were supposed to be carried.

"Q. Did you ever see any passengers carried up by these elevators or by the one which caused this accident? A. Yes, I have seen people carried on them.

"Q. Were they in there under any permission from you? A. No, they were not.

That he only kept a record of the time in connection with this elevator service in order to check the bills.

And thereupon said witness further testified as follows:

"The COURT: Now, gentlemen, there are just a few questions

that I have it in mind to either suggest to you to ask or to ask myself. I will ask them, and if either of you should think that it infringes at all upon your field of what is admissible, I will desist, but as far as you think they are proper, I will ask the witness to answer them, and you notice what they are.

"Mr. FLANNERY: Yes, sir.

"By the COURT:

"Q. You said the operator's name was Locke? A. Yes, sir.

"Q. Was he there before your company began to have the use of the elevators? A. I think he was. He is a general employee of the Otis Elevator Company.

"Q. How long had he been operating the elevator before your company had any use of it? A. I could not say on that, because I don't remember.

"Q. Do you think he was in that for some time? A. I think he had been there some time working, installing the machines.

32 "Q. Who, if any one, gave any directions as to how large a load should be taken up? A. I don't think any directions were given. It was left to his own discretion.

"Q. I only asked you who, if any one, gave any directions as to how large a load should be taken up. If you do not know, you can say you do not know. A. No, I do not know anything about it.

"Q. Who, if anyone, gave any directions as to the speed at which the elevators should run? A. No one.

"Q. Who, if any one, gave any directions as to when or where the elevators should stop? A. Well, that would depend upon what he was doing, a whole lot. We were carrying material up to the top floor, sometimes, and he would stop on the 7th or 8th or 9th floor, or wherever this material was to go he was told to stop.

"Q. To leave it at a certain floor? A. Yes.

"Q. Was a signal given to him when to stop? A. No; he was told to put it off there at a certain floor.

"Q. Before he started? A. Yes, sir.

"The COURT: Those are all the questions I have.

"Mr. FLANNERY: Will your Honor allow me a question along that line?

"The COURT: Yes.

"By Mr. FLANNERY:

"Q. At the trial of the case of McCloskey vs. The Fuller Company, did you give this testimony in response to questions propounded to you:

" 'That you told Locke to obey the order of Minte and his painters while operating the said elevator, and the order of the signals when the painters wanted to go up and come down, and told Locke to observe the signals that might be given to him, and how the painters wanted the elevator operated.' "

33 "Did you testify to that? A. I did; but I should like to give a little explanation as to that.

"Q. You did give that testimony? A. Yes I did; but I can give an explanation as to that, now.

"Q. All right, sir; go ahead. A. The elevator at that time that he is referring to, your Honor, was being used by the Mackay Company to paint the shaft. There were two men up on the top of this elevator, and as they would come down, they would finish up a piece of the wall and they probably would want to drop down six or eight inches. In doing that one of the men on the top of the elevator, Mackay's man, would call down to the operator, Locke, and tell him to drop down whatever space they wanted, six inches or eight inches, or whatever it was. In that way he had to receive his instructions from the men on top of the elevator."

And thereupon counsel for defendant admitted that it was not claimed by the Otis Company that it ever gave the elevators into the custody of the Fuller Company for any purpose they wanted to put them to.

WILSON A. MCCLOSKEY testified that he was the same Wilson A. McCloskey who was injured in the accident in the Hibbs Building, August 9, 1907; that he was then employed by the Robert E. Mackay Company and at the time of the accident was engaged in painting the elevator shaft at the top of the elevator; that he sued both the Otis Elevator Company and the George A. Fuller Company for his injuries; at the time of the accident they had completed the painting of the shaft and he told Locke, who was in charge of the elevator, to take them up to the second floor so he could get off; that Locke started the elevator and when they got up to the second floor it kind of paused as if to stop, and when he made an effort to get off it started again and the next place he landed was at the fifth floor, and his foot was caught between the top of elevator and the weights and the tendons were cut off the back of his leg; he was on top of the elevator and after it started again he couldn't get off; they had been painting the shaft.

34 Thereupon counsel for the plaintiff introduced in evidence a part of the record, the declaration, in the case of Wilson A. McCloskey vs. George A. Fuller Company and the Otis Elevator Company, at Law No. 50,782, and it was conceded by counsel for the defendant that the witness was the plaintiff in that case, and that the parties to the instant suit, the Otis Elevator Company and the George A. Fuller Company, were the defendants in that case.

"The COURT: The record, of course, is admissible so far as it is material to support the allegations of the declaration and will be treated as in the case."

[Said declaration appears at pages 1, 2 and 3 of the transcript of record in the Court of Appeals, in the case of Fuller Company vs. Wilson A. McCloskey, April Term, 1910, No. 2153, and under the stipulation of counsel hereinafter appearing, it is hereby referred to and made a part of this bill of exceptions as fully as if incorporated and set out at length herein.]

On cross-examination said witness testified that at the time of the accident he was employed by the Robert E. Mackay Company, a sub-contractor of the Fuller Company and was engaged in painting the shaft at the time of the accident; they were using the elevator car as a travelling stage or scaffold to go up and down; the car was being operated by Locke, moving it up and down; that he would call to Locke and tell him where they wanted the car moved to; in the course of one of these movements he told Locke to let him off at the second floor, and while in the act of getting off, the elevator started or was caused to move and he was carried up to the fifth floor and his foot was caught there by the weights; and thereupon the following questions and answers occurred:

"Q. At that time were there any passengers in the elevator car? A. Were there any what?

"Q. Were there any passengers in the elevator car? A. I think there were.

"Q. Are you sure about that? A. I think there were some in there. I am not certain about that.

"Q. I mean at this very particular time when you were caught, when you were using it? A. I think there were. I am not sure about that. There was somebody in there.

"Q. When you got on top of the car you notified Mr. Locke what you were going to do, did you? A. Well, he knew that. I think he understood it."

And thereupon the plaintiff to further maintain the issues on its part joined gave evidence tending to show it had paid the sum of $6,628.60 in satisfaction of the judgment and taxable costs in the case of Wilson A. McCloskey vs. the George A. Fuller Company, Law No. 50,782, and defendant's counsel waived proof of costs paid in the Court of Appeals and the U. S. Supreme Court, on the appeals in said suit; and the plaintiff also introduced in evidence the Docket entries in said cause as set forth in Law Docket 55 pages 92 and 517, as follows:

Law. No. 50782.

"WILSON A. MCCLOSKEY
vs.
GEO. A. FULLER and OTIS ELEVATOR CO.

1908, July	18.	Appearance, order, Decl. & Notice filed.
"	18.	Summons (3) and copies (2) decl. &c. issued.
"	20.	" " " " served.
"	28.	Appearance for Def't No. 2=Plea filed.
Aug.	11.	Appearance for Def't No. 1=Plea not guilty filed.
"	11.	Joinder in issue filed.
"	24.	Joinder, note of issue and notice of trial filed.
Nov.	20.	Leave to amend decl. forthwith & all pleadings to stand as pleadings to amended decl.
1909, Oct.	12.	Jury sworn & respited.

" 13. Verdict for def't Otis Elevator Co.—Jury respited (M. 52, p. 382).
" 18. Jury respited.
" 19. Verdict for pl'ff vs. def't Geo. A. Fuller Co. for $5,425.00 (M. 52, p. 390).
" 20. Motion for new trial, notice & receipt filed (M. 52, p. 393).
" 20. Judgment on verdict for def't Otis Elevator Co. for costs (M. 52, p. 393).
" 29. Motion for new trial overruled & Judgment on verdict for Pl't'ff for $5,425.00 & int. fr. date & costs. Appeal noted. Supersedeas fixed at $8,000 (M. 52, p. 403).
Nov. 1. Appeal bond ($8,000.00) approved & filed.
1910, Feb. 24. Bill of exceptions signed & filed (M. 54, p. 81).
1913, May 2. Mandate affirming Judg't.
" 5. Judgment in favor of pl't'ff entered satisfied by order of Pl't'ff";

also all of the pleadings in that case, the separate plea of the
36 general issue by the Otis Company on page 3 of the transcript, separate plea of general issue by Fuller Company on page 4, joinders of issue by plaintiff on page 4, and leave to plaintiff to amend, on pages 4 and 5; also the minutes of the Supreme Court of the District of Columbia, Volume 52, page 381, showing the impannelling of a jury and at page 382 the direction of a verdict for the defendant the Otis Elevator Company; at page 382, judgment on said verdict (transcript Rec. page 5, in Court of Appeals); on page 390 the verdict in favor of the plaintiff and against the George A. Fuller Company for $5,425; page 393, the motion of defendant Fuller Company for a new trial; and page 403, order overruling motion for new trial, the judgment upon said verdict and the appeal to the Court of Appeals of the District of Columbia; also the mandate of the Court of Appeals showing the affirmance of said judgment by the Court of Appeals and by the Supreme Court of the United States; also from the record of said cause the instructions given to the jury at the end of the case against the Fuller Company as showing what matters were submitted to the jury for determination (transcript Rec. pages 58-62, Court of Appeals, No. 2153); and the testimony of the elevator operator, Locke, in the case of McCloskey vs. Fuller Company, not as proof of the substantive facts but to show what the jury in said case had before it when the case was decided as relating to the Fuller Company (appearing in transcript in Court of Appeals case No. 2153, Rec. pages 50-53).

Thereupon counsel for the defendant admitted that after the verdict was rendered in said original case in favor of the Otis Elevator Company both said Company and its counsel withdrew and took no further part in the defense of that case and had no further control of it, although one representative of the Company was recalled to the stand, by counsel for the Fuller Company, according to the record.

It was further agreed by and between counsel that said transcript

of the record in the original case might be used in this case wherever the subject matter was admissible.

Thereupon counsel for the plaintiff announced his testimony closed.

Thereupon the defendant, to prove the issues upon its part
37 joined, offered in evidence the transcript of the record in the Supreme Court of the United States in the case of George A. Fuller Company vs. Wilson A. McCloskey, No. 176, October Term, 1912, filed November 22, 1912, (which transcript of the record included the record in the Court of Appeals of the District of Columbia in said case No. 2153, April Term, 1910)—being a complete record of the testimony and proceedings in said original cause under the declaration filed July 18, 1908, in the case in which Wilson A. McCloskey was plaintiff and the George A. Fuller Company and the Otis Elevator Company, Corporations, were defendants—in support of the plea of res judicata interposed by the defendant in the case at bar, and also for the purpose of showing the facts that had been adjudicated in the Court of Appeals and the United States Supreme Court and the points of law which the Court decided in the first case, out of which this second action grows.

And counsel for the defendant for the purpose of showing that the Fuller Company, in the Court of Appeals and in the Supreme Court of the District of Columbia, after the Otis Company was let out of the original case, had assumed the attitude that the services of Locke had been transferred from the Fuller Company to the Mackay Company, and that the Fuller Company having adopted that attitude was now estopped from changing its position and claiming to recover over against the defendant in the case at bar, also offered in evidence the following extract from the brief of counsel for the Fuller Company filed in the Court of Appeals of the District of Columbia in said original case:

"On this state of the evidence the court below took the view that that was a transfer of Locke from the service of the Otis Company into the service of the Fuller Company for the time being. We may assume that to be the fact and the law."

[To which offers, except the judgment of the Court of Appeals, plaintiff's counsel objected upon the ground that there is nothing res adjudicata between the plaintiff and the defendant in this case occurring by reason of the judgment in the McCloskey case rendered upon the verdict for the Otis Elevator Company at the end of plaintiff's case, on the ground also that anything which the Court of Appeals may have said as between the Otis Elevator Company
38 and the George A. Fuller Company on the status of the case there, was res inter alios acta, and in so far as these two parties are now concerned, and particularly the George A. Fuller Company, it would have the effect of a judgment coram non judice; that being the status, it was urged that the transcript (other than what the plaintiff offered) and the brief and the opinion of the Court of Appeals were not admissible under the defendant's plea of res adjudicata; that the relations between the Otis Elevator Company and George A. Fuller Company remain open for determination in this

court and cannot be res adjudicata, the judgment not being in bar between the plaintiff and the defendant in this case, nor may be offered by way of estoppel, because they were not adversary parties in that proceeding; also that the judgment in favor of the Otis Company in the McCloskey case was not a judgment rendered against the plaintiff in this case; also upon the ground that under the defendant's plea of res adjudicata a certain judgment was set up and the record which is now offered varies from the facts set forth in that plea and shows that there was no such judgment as pleaded; also upon the further ground that each of the matters offered is irrelevant and immaterial.]

But the Court overruled the objection of plaintiff's attorney and admitted the whole of defendant's said offer, but not as evidence under the defendant's plea of res judicata, the court stating that it was not a matter of res judicata, and it would hold so.

38½ The aforesaid transcript of the record is in the words and figures following, to wit:

39 *Transcript of Record.*

Supreme Court of the United States, October Term, 1912.

No. 176.

GEORGE A. FULLER COMPANY, Plaintiff in Error,
vs.
WILSON A. McCLOSKEY.

In Error to the Court of Appeals of the District of Columbia.

Filed November 22, 1910.

(22,414.)

40 (22,414.)

Supreme Court of the United States, October Term, 1911.

No. 444.

GEORGE A. FULLER COMPANY, Plaintiff in Error,
vs.
WILSON A. McCLOSKEY.

In Error to the Court of Appeals of the District of Columbia.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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42 In the Court of Appeals of the District of Columbia.

No. 2153.

GEORGE A. FULLER COMPANY, Appellant,
vs.
WILSON A. McCLOSKEY.

Supreme Court of the District of Columbia.

At Law. No. 50782.

WILSON A. McCLOSKEY, Plaintiff,
vs.
GEORGE A. FULLER COMPANY and OTIS ELEVATOR COMPANY, Corporations, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration and Notice to Plead.

Filed Jul- 18, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 50782.

WILSON A. McCLOSKEY, Plaintiff,
vs.
GEORGE A. FULLER COMPANY and OTIS ELEVATOR COMPANY, Corporations, Defendants.

The plaintiff, Wilson A. McCloskey, sues the defendants the George A. Fuller Company, a corporation, and the Otis Elevator

Company, a corporation, for that heretofore, to wit, on the 9th day of August, 1907, and for some time prior thereto, the said defendant, the George A. Fuller Company, was engaged in the
43 building, erection and completion of a certain building in the city of Washington, District of Columbia, known as premises No. 723 15th Street, N. W. wherein was located an elevator shaft or an enclosed open space, extending from the bottom floor of said building to the upper story thereof, and in said elevator shaft was a certain elevator, which said elevator had as its motive power electricity and was moved up and down the elevator shaft or enclosed space from the bottom of said building to the top thereof, said elevator shaft containing openings at each floor for passengers to get on and off; that in order to balance said elevator large weights are provided, which are attached to said elevator by means of steel cables, which said weights move along and near to the side of said elevator between the said elevator and the wall enclosing said open space known as the elevator shaft, so that as the elevator moves up, the weights move down and vice versa as the elevator comes down, and so that at the fifth story of said building which is ten stories in height the elevator and weights meet, and the plaintiff says that the said George A. Fuller Company then and there employed a certain other company known as, to wit, Robert E. Mackay Company to paint the said elevator shaft in its various parts, and that said Robert E. Mackay Company entered upon such work and the plaintiff says that he was then and there in the employ of the said Robert E. Mackay Company and was by them directed to do the manual work of the painting of said shaft, as aforesaid, and that he then and there, to wit, on the day and year aforesaid was engaged in such work; that in order that the said Robert E. Mackay Company, its agents and employees might more conveniently and expeditiously paint the said elevator shaft as aforesaid, the said George A. Fuller Company entered into an agreement with said Robert E. Mackay Company for hire, to operate said elevator, so that said company's employees might stand on top of the elevator and that it might be lowered or raised as was necessary in the painting of said shaft and to start and stop said elevator whenever and wherever requested by this plaintiff, so that he might continue to paint or to alight from said elevator; that in pursuance of said contract for use of said elevator, the defendant the George A. Fuller Company, employed the Otis Elevator Company to run and operate the said elevator, to start and stop the same at such times and at such places during the time that said elevator shaft was being painted as this plaintiff or any other employee of said Robert E. Mackay Company, who might be engaged in the painting of said shaft, might designate; that it then and there became and was the duty of it, the said George A. Fuller Company to so operate or cause to be operated said elevator, as the said plaintiff's employer of any of its employees engaged in said painting work might designate, and not to start the said elevator, or if started, not to carry said elevator farther than might be designated as aforesaid, and it then and there became the duty of the said defendant Otis Elevator Company, to execute the requests of the

plaintiff's firm or any of its employees engaged in said work, among whom was the plaintiff, and especially not to start said ele-
44 vator, or if started not to carry the same beyond the point designated; that said plaintiff on the day aforesaid had finished his work, he then being on top of the said elevator, below the second floor, requested the said defendant Otis Elevator Company, its servants and employees to stop said elevator at the second floor, so that he might get off and alight therefrom; but the said defendants not regarding their said duties in the premises, did so negligently, carelessly and recklessly operate and caused to be operated said elevator, that the same was carried up to the fifth floor where the said weights and elevator meet, as aforesaid in direct violation of the request of the plaintiff; to stop the same at the second floor; that by reason of such carelessness, negligence and recklessness the plaintiff's right leg was caught between the elevator and the iron weights aforesaid in such manner that one of the tendons was permanently severed at or about the ankle; that the bones of his right foot were fractured and his foot and leg were otherwise crushed and mangled; that by reason of such injury due to the carelessness, recklessness, and negligence of the defendants as aforesaid, he the plaintiff then and there became and was very sick, weak and distempered and remained so for a long time to wit, from said day to the present time and still suffers, and will continue to suffer great pain from said hurts; that he was, is and will continue to be deprived of the free use of the said leg by the said injuries; which said injuries are of a permanent character; that by reason of the hurts and injuries aforesaid, he has been prevented and will be permanently prevented from pursuing his trade, that of a painter, and is and will be permanently disabled and prevented from pursuing any occupation requiring manual labor; and the plaintiff was also put to great expense, to wit, in the sum of $500 in the attempted cure of his said hurts and injuries, all to the damage of the plaintiff in the sum of $10,000, wherefore he brings this suit and the plaintiff claims of the defendants the sum of $10,000, besides cost of suit.

S. V. HAYDEN,
Attorney for Plaintiff.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

S. V. HAYDEN,
Attorney for Plaintiff.

Separate Plea of the Otis Elevator Company.

Filed Jul- 28, 1908.

* * * * * * *

Now comes the defendant, the Otis Elevator Company, and for a separate plea to the declaration of the plaintiff filed in the above entitled cause says that it is not guilty as therein alleged.

McKENNEY & FLANNERY,
Attorneys for the Defendant
the Otis Elevator Company.

45 *Plea of Defendant George A. Fuller Co.*

Filed Aug. 11, 1908.

* * * * * * *

Now comes the defendant George A. Fuller Company and for a plea to the declaration in the above entitled cause, says that it is not guilty in manner and form as in the said declaration alleged.

EDW. S. DUVALL, JR.,
Attorney for Defendant the George A. Fuller Company.

Joinder in Issue upon Plea of Otis Elevator Company.

Filed Aug. 11, 1908.

* * * * * * *

The plaintiff joins issue on the plea of the defendant, the Otis Elevator Company.

S. V. HAYDEN,
Attorney for Plaintiff.

Joinder in Issue to Plea of Defendant George A. Fuller Company.

Filed Aug. 24, 1908.

* * * * * * *

The plaintiff joins issue on the plea of the defendant, the George A. Fuller Company.

S. V. HAYDEN,
Attorney for Plaintiff.

Supreme Court of the District of Columbia.

FRIDAY, November 20, 1908.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

Upon consideration of plaintiff's motion filed herein he is hereby granted leave to forthwith amend the writ and his pleadings herein, viz: 1. By striking out the name "Willien" where the same appears therein and inserting the name "Wilson" in lieu thereof.

46 2. In the twentieth line of the third folio of plaintiff's declaration, after the word "plaintiff" strike out the word "left" and insert in lieu thereof the word "right," and after the word "his" in the twenty-third line of the same folio strike out the word "left" and insert the word "right."

And it is further ordered that the pleadings of the defendants be allowed to stand as though filed to the plaintiff's declaration as amended.

Memoranda.

October 13, 1909.—Verdict for Defendant, Otis Elevator Company.

October 19, 1909.—Verdict for Plaintiff for $5,425. against George A. Fuller Co.

Supreme Court of the District of Columbia.

WEDNESDAY, October 20th, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

It appearing that under the Rule of Court, judgment on verdict should be entered herein in favor of the Otis Elevator Company, one of the defendants, it is so ordered. Wherefore, it is considered that the plaintiff herein take nothing against said defendant Otis Elevator Company, that said defendant go hereof without day, be for nothing held, and recover of plaintiff its costs of defense to be taxed by the clerk, and have execution thereof.

FRIDAY, October 29, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

Now comes on for hearing defendant's motion for a new trial herein, upon consideration whereof, it is ordered that said motion be, and the same is hereby overruled and judgment on verdict is ordered. Wherefore, it is considered that the plaintiff herein recover of defendant herein, the sum of Five Thousand Four Hundred and Twenty-Five Dollars, for his damages as aforesaid assessed, with interest from this date, together with costs of suit to be taxed by the clerk, and have execution thereof.

From the aforegoing, the defendant by its attorneys, in open court, notes an appeal to the Court of Appeals of the District of Columbia.

Thereupon, upon motion of defendant the penalty of a bond to operate as a supersedeas, is hereby fixed in the sum of Eight Thousand Dollars.

47 *Memoranda.*

November 1, 1909.—Appeal bond approved and filed.

December 13, 1909.—Bill of Exceptions submitted and time to file record in Court of Appeals extended from time to time to and including March 15, 1910.

Supreme Court of the District of Columbia.

THURSDAY, February 24, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

The Court having this day signed the Bill of Exceptions taken at the trial of this cause and heretofore submitted herein now orders the same of record nunc pro tunc.

Bill of Exceptions.

Filed Feb. 24, 1910.

* * * * * * *

Be it remembered, that at the trial of this cause before the Honorable Chief Justice Clabaugh of the Supreme Court in and for the District of Columbia, and a jury regularly empannelled and sworn to try the issues pending between the plaintiff and the defendants, counsel for the plaintiff, to maintain the issues on his part joined, produced as a witness HELGE O. H. MURRAY, who, having been first duly sworn, testified that he was a draftsman and that he made a drawing of the east elevator in the Hibbs Building at 723 15th Street Northwest in this City. That said drawing is hereto annexed. That the top of the elevator, from measurements made by him, was twelve inches in height and dome shaped; that the extreme measurement of the elevator was four feet eleven and one-half inches in width and depth with a flat surface or rim six and one-half inches in width, on top of the elevator and lying between the dome and the four edges of the top; at the top of the elevator and secured thereto were two sets of cross beams, one set arranged diagonally of the other and intersecting at the center of the top of the car; that the width of one set of cross-beams was ten and one-half inches and the width of the other set two inches and that from the top of the beams to the rim or flat surface of the roof of the elevator was thirty-three inches while it was twenty-seven inches from the said flat surface to the bottom of the beams; that the counterweight of the elevator was twenty-eight inches in width and operated with one inch of clearance between it and the rim or flat surface aforesaid, the said counterweight being located on the east side of the car; that
48 to the south of the counterweight there was a space of seventeen inches on the aforesaid flat surface or rim measuring to the front edge of the top of the car; that the dome was of sheet metal and that the entrance to the car, viewing the top in plan, was in the south side.

Upon cross examination, by counsel for the defendant the George A. Fuller Company, the witness testified that the elevator tracks were located in opposite corners of the shaft, one set of tracks being at the back thereof and on the same side with the counterweights while the other set was located at the front of the shaft, both sets being in line with the wider set of cross-beams.

Upon cross examination by counsel for defendant, the Otis Elevator Company, the witness also testified that the elevator top was all closed and that on top of the dome there was a surface two feet square.

Upon further cross examination, by counsel for defendant, the George A. Fuller Company, the witness testified that the aforesaid cross-bars were fixed to the car by being supported on the top thereof and to one set of said cross-bars were connected the shoes that slide upon the elevator tracks; and the distance on the aforesaid rim from the front of the car to the weights measured seventeen inches.

The examination of said witness being concluded, WILSON A. MCCLOSKEY, plaintiff, was produced as a witness in his own behalf and testified as follows:

That he is the plaintiff in this case. In the month of May, 1909, he examined the elevator that has just been described in the Hibbs Building. It is in the same condition now that it was on August 9, 1907; that he is a painter thirty-six years old employed on August 9, 1907, at the Hibbs Building, 723 15th Street; that he was painting the elevator shaft. They were painting the east shaft. They commenced on the tenth floor and worked down. They had finished their work as far as they could, down to the bottom floor without working under the elevator. He asked Joe (meaning Mr. Locke) to take them up to the second floor and to leave them off there so they could get under the elevator and go down to the bottom floor. Locke started the car and when he got to the second floor he made a pause as though he were going to stop the car and all at once he started again and before witness could regain himself he was fast in the weights. He was standing right where he had finished on the east side of the elevator between the weight and the opening that is the front door. Witness then indicated this point on the drawing. He was standing with one foot behind the other on the six inch ledge or rim. The elevator paused at the second floor and then the operator ran him into the weights on the fifth floor. When they got to the second floor and made no effort to stop, witness changed the brush under his arm and went to make an effort to open the door. He had stopped the car, you might say, had sort of come to a pause and all of a sudden he started the car up. That threw witness off his balance and before he could regain himself he was in the weights—caught between the weights and the top of the car. He was held in that position just about five minutes. Mr. Renner, the man who was working with him on the car,
49 helped to extricate him. Witness had a paint box and stippling brush in his hands. The leaders were completely cut off the back of his leg and his heel was smashed. The bones were broken. He was taken to the Emergency Hospital and was there about six weeks or may be eight weeks. He then went home and remained at home two weeks and then went to the Providence Hospital for a skin grafting operation. He remained at that hospital eight weeks and then went home and kept going to the dispensary

of the Providence Hospital for treatment. Later on, on the 6th day of June, he went to the Garfield Hospital and was there four weeks, in the year 1908. Since then he went to the Garfield Hospital last winter and was there about eight weeks. The tendon was severed and the bones of the heel were broken. The effect is that he is not able to do any work and not able to be on his feet much. He has an iron shoe or an iron sole to enable him to get around at all. At this point the witness exhibited his injured foot to the jury. He has not much use of his foot now. It swells up and pains him when he is on his foot for any length of time. At this time the wound is open and discharging. Since receiving the injury he has not done any manual labor and has not been able to. He tried but could not do it. He is now a night watchman at the Central Union Mission, getting two dollars a week, but got only one dollar at first. His wages as a painter were twenty-one dollars a week. He is also a paper hanger. He spent about $175 on account of his injuries. When he went to the hospital he was there in the free ward, except at Providence Hospital. While there he paid one dollar per day. At the Emergency, Dr. White was Superintendent. At the time of the accident he was working for the Mackay Company of New York. A man named Locke was running the elevator. Witness knew him. The Mackay Company was doing the painting in the Hibbs Building. A couple of men were in the elevator at the time. He does not know who they were. Witness did not exercise any control over the operator. He had nothing to do except to inform the operator where he wanted to go and where he wanted the operator to take him. That is all he had to do with the operating. He told the operator that he wanted to stop at the second floor. He told the operator to take them up to the second floor and leave them off; that they wanted to get underneath the elevator. They were on top of the car and wanted the operator to take them to the second floor and get off so as to ride down to the bank floor and get out and get under the elevator to go to work. Mr. Renner stood on the south side of the car next to the door.

Upon cross examination by counsel for the defendant, the Otis Elevator Company, the witness testified as follows:

Q. How long had you been working on the elevator shaft? A. That morning, you mean?

Q. No; I mean altogether. A. I don't remember; I worked at different times.

Q. Can you not tell us whether you had been working there covering a period of a week or two weeks or three weeks? A.
50 You see it was a day and then half a day and back and forth so on, and I could not recall exactly.

Q. This accident happened on what day? A. On the 9th of August, 1907.

Q. And when did you go to the Hibbs Building and begin to paint the elevator shaft? A. I could not tell that.

Q. You had been at work about the shaft for about three weeks, had you not? A. I worked there at different times.

Q. And you were using the elevator-car in painting the shaft, were you not? A. Yes, sir.

Q. As a sort of travelling stage, going up and down? A. Yes, sir.

Q. How many painters worked with you on the shaft? A. Sometimes there were four of us. No, there were only two of us on the inside, only two on the inside.

Q. Who was the boss of the men who were working on the inside? Q. Who was the boss of the painters? Robert Minte.

Q. What is his position with the McKay Company? A. He was foreman.

Q. Was he inside the shaft working on the car with you? A. No sir.

Q. Who was in charge of the men while they were working on the shaft? A. Well, I most generally was; I was in charge that day. That is, I directed them.

Q. Yes, you directed them that day. Minte would tell you what to do and then you would tell the men? A. No, he didn't tell me; he simply told us to go in there and paint the elevator and touch up the spots, and of course one or the other of us had to give the commands or instructions.

Q. So that day you were giving the instructions or commands? A. Yes, sir.

Q. And you were the one who told the elevator operator how to move the car up or down as you wanted it moved. Mr. Renner didn't do that, but you did it that day, did you not? A. I asked him that time. I don't know whether Renner asked him or not.

Q. Renner was working with you? A. Yes sir.

Q. Had you finished all your painting on the shaft that morning? A. No, sir.

Q. The roof of the elevator was a closed roof, was it not? A. It was a sheet iron top, I believe.

Q. And there was no way of your being seen by the elevator operator from the inside of the car, was there? A. No, sir.

Q. To communicate with the elevator operator you would have to call to him, would you not, in a loud voice? A. Speak in a loud voice? It was very easily heard. It was open all around the car.

Q. That is, it is open on one side, is it not? A. Well, it is open on the front. I din't know about the sides, whether there is lattice work on the sides or not; I don't recall that.

Q. Is it not a fact that there are two cars running up in twin-shafts? A. Yes sir.

Q. With an open-lattice work around the doors and simply
51 an opening between the two cars, and the balance is brick work masonry? A. Yes sir. There are cross-beams along between the cars.

Q. How long had this elevator operator been operating the car; had he been there all the time, all the three weeks that you were employed on the shaft? A. I think so.

Q. You knew him pretty well, didn't you? A. Yes sir.

Q. You knew him well enough to call him by his first name? A. Joe; yes.

Q. And he called you by your first name? A. I don't know what he called me. I guess he called me Mac.

Q. Was anybody present when you told Locke, the elevator operator—— A. Mr. Renner was right by me.

Q. Were you inside the car; I mean were you on top of the car then, or outside the shaft? A. On top of the car.

Q. Where were you on the first floor? A. On top of the car at the first floor.

Q. And you wanted to get off at the second floor? A. Yes, sir.

Q. And the roof of the car was pretty close to the second floor, was it not? A. It was perhaps ten feet; I could not say. May be it was ten feet, but that would be a guess.

Q. Did Locke hear what you said? A. He must have; he started the car.

Q. Did he make any response to you? A. I could not say; I don't recall.

Q. Did you make any effort to find out whether Locke understood you wanted to get off at the second floor? A. No; I didn't make any effort because I would tell him in a distinct, loud voice, where I wanted to go, and he would take us there.

Q. So you called to him that you wanted to get off at the second floor, and when you started you assumed that he heard what you told him? A. Yes, sir.

Q. But you cannot say positively that Locke did hear you? A. I don't know what he started the car for if he didn't hear me.

Q. If you had not given instructions at all, and somebody was getting on—— A. He was not supposed to carry passengers when we were working there.

Q. And he was not supposed to operate the car without receiving a direction from you, was he? A. I don't think so, not when we were in danger up there all the time.

Q. He was only to take the car up and down when you told him to do it, was he not? A. Yes sir.

Q. And on this occasion you told him you wanted to get off at the second floor? A. Yes sir.

Q. That would require the moving of the car how many feet? A. I suppose ten or twelve feet. I could not say, but it would be along there somewhere.

Q. Was Mr. Renner standing on the rim of the car, or standing on the flat surface on top of that dome? A. He was on the rim.

Q. How big was that flat surface on the dome of the car? A. Up on top?

Q. Yes. A. I don't know; but I don't think it is over three feet.

52 Q. Three feet square? A. Yes; I don't know whether it is that much.

Q. That was about twelve inches above the rim where you were standing? A. I believe it is twelve or fourteen inches or something like that.

Q. And this rim was only about six and a half inches wide? A. Yes sir.

Q. That is, there was a distance of about six and one-half inches between the side where the weights ran up and down and the rounded part of the dome? A. How is that?

Q. This ledge was about six inches from the side where the weights went up and down to the rounded part of the dome was it not? A. Six and a half inches, I believe.

Q. What were you doing while standing there? A. I just finished my work where I stood, and as I only had a few feet to go I asked him to carry us up there.

A. In working on top of the car in that shaft off and on during three weeks you had seen where the weights hung and where they passed, had you not? A. Yes sir.

Q. And you knew they passed about the fifth floor somewhere, did you not? A. Yes sir.

Q. That is, the weights of the car, ascending and descending would meet about the fifth floor? That is, the weights passed about the fifth floor? A. Yes sir; the fifth floor.

Q. On which side of the shaft were the weights? A. They were on the east side.

Q. That was the side you were standing on? A. That was the side I was standing on.

Q. Did you not regard that as a rather dangerous place to stand, the east side of the car where the weights were? A. Not where I was standing; I was standing with my feet in, in the clear.

Q. Were you talking to Renner? A. I don't know that I was, not then.

Q. Had Locke, at any time during those three weeks, ever refused to start the car and stop the car and run it when you wanted to go up and down? A. No; I don't think so; I don't know whether he had or not.

The COURT: I did not catch that.

Mr. FLANNERY: I asked him whether Locke had ever refused to start the car or stop it when he asked him to, in obedience to his directions, and he says he thinks not.

By Mr. FLANNERY:

Q. Well, if he had done so, you would remember it, would you not? A. Sir?

Q. If he had refused to take you up or bring you down you would remember it, would you not? A. I think so. I don't remember it.

—. And to the best of your recollection he did not do it? A. Not to my knowledge.

53 Q. What sort of an elevator was it? A. It was an Otis Elevator? Is that what you mean; the make of the elevator?

Q. No; I mean was it an electric elevator or what is called a hydraulic elevator? A. It was an electric, I think; I am not certain that it was an electric elevator.

Q. While you men were working around there the elevator was operated at a very low rate of speed, was it not? A. I think it ran just about the same as it does now. It runs pretty fast.

Q. If it was running the same as it does now, how could you

paint the shaft from the dome to the elevator? A. How could we?

Q. Yes. A. Why, the elevator was standing still when we were working.

Q. But when you were touching up this elevator shaft, a spot here and a spot there, it was running very slowly, was it not? A. He would raise me up or drop it down a couple of feet, wherever we wanted — go, and then we would stop just at the spot we wanted to be.

Upon cross examination by counsel for the defendant the George A. Fuller Company, witness testified as followz:

Q. How long were you working inside the elevator shaft the day of the accident? A. The morning of the accident?

Q. Yes. A. I don't remember, but I think about nine o'clock or half-past nine.

Q. What time did you go to work? A. Half-past seven.

Q. What work did you do before you went to work in the elevator shaft? A. I don't understand your question.

Q. You say that you started to paint the elevator about nine o'clock. A. No; about half-past seven.

Q. I misunderstood you, then. What time did this accident occur? A. It was about nine or half-past nine; I could not tell exactly.

Q. How many coats did you put on that elevator shaft or on the wall? A. Well, I helped put on different coats. I don't know how many were put on.

Q. How long were you engaged in helping to put on different coats? A. I could not recall that. I worked there from time to time.

Q. Was it two or three days or a week? A. I expect it was perhaps a week.

Q. Was it more than a week? A. I could not say.

Q. Could it have been more than a week? A. I could not say.

Q. After you put on the different coats, you said you did some touching up. What did that consist of? A. The spots on the wall where plaster had been broken out and plastered up.

Q. And that required you to direct the elevator operator to go up and down very slowly, did it not? A. I didn't ask him to carry me very slowly.

The COURT: You are going over the same thing.

Mr. DUVALL: This is more particularly as to the work he did that particular day. But will change that line of examination.

54 Q. At any time that you were working on that elevator, did you have it held in one position for any length of time? A. It would be held there until we got through painting.

Q. Now, on this day, when this accident occurred, you say you dropped from the tenth floor to the first floor touching up spots, and then at the first floor you say you wanted to go to the second floor to get off. A. Yes, sir.

Q. And you say that there was a pause at the second floor and

you reached to open the door; is that correct? A. I don't know that I reached. I placed the brush under my arm. I had a paint box and a paint brush under my arm, a stippling brush; and I made an effort to get ready to open the door, but I don't think I reached.

Q. What did the effort consist of? A. Changing the brush under my arm.

Q. And the elevator was still in motion? A. It was just about to stop, and I made the change and it started again.

Q. It was still moving? A. It stopped and started.

Q. What length of time did that consume, that stopping and starting again? A. I could not tell you.

Q. Whom did Lock work for, do you know? A. He was working for the Fuller Construction people, I understood.

Q. You understood that? A. Yes sir.

Q. Do you know whom he was working for? A. I am pretty sure of it. He told me so.

Q. How do you know that? A. He told me he was.

Q. Locke t[illegible] you he was? A. He said he was paid by the Fuller people.

Q. When did he tell you that? A. He told me that in the presence of Mr. Hayden.

Q. When was that? Will you tell me when this was that you had that conversation? A. I cannot recall, but it was down to the Munsey Building.

Q. Was anyone else present besides Mr. Hayden and yourself? A. No; and Mr. Locke.

Q. Where did your painters keep your materials while you were working there? A. We had been keeping them on the fifth floor, but the shop had been moved to the other building.

Q. Did you have any materials stored in this building on the day of the accident? A. No sir.

Q. You say that the elevator went beyond the second floor. What effort, if any, did you make to have the elevator stopped? A. What effort did I make?

Q. Yes. A. Nothing more than to ask him to leave me off at the second floor.

Q. I mean when you found that the elevator was going beyond your destination, what effort did you make to have him stop it? A. I didn't pretend to make any effort. He started with a jerk and threw me out of balance, and before I could get up I was fast in the weights.

Q. You mean you had no time between passing the second
55 floor and the fifth floor to do anything to stop the elevator?

A. That is a short distance from the second floor to the fifth floor.

Q. You made no outcry whatever when you lost your balance? A. It confused me and I didn't have any chance to make any outcry.

Q. Did Renner say anything? A. Renner didn't know what to think about it. I don't think he did.

Q. You know where the tracks are that that car ran on? A. I know where they are, but I don't know whether I can locate them.

Q. Who painted those tracks on the outside? A. Well, I think I helped to do it, although I could not say.

Q. And you knew that elevator weights were located very close to those tracks? A. Yes sir.

Q. And you knew that they passed the car between the fourth and fifth floors? A. Yes sir.

Q. Near the fifth floor. Did you ever have occasion to use the cross-bars over the top of that car while painting the shaft? A. Did I ever have occasion to use the cross-bars?

Q. Yes, for a place to stand. A. No; we never made use of them.

Q. You never used them? A. We sometimes would hug up in there.

Q. You never got on top of the cross-bars? A. No sir; I don't remember that.

Q. Why, on this occasion, did you not stand on the cross bars instead of standing on the ledge? A. No, sir; I stood on the ledge.

Q. Was not the cross-bar there a better place to stand or sit? A. No, sir.

Q. Why not? A. It was 33 inches high, and it was narrow, and you would get up there and there would be no place to balance yourself.

Q. And you could not perch up on those cross-bars and catch hold of the cable and be in a safe position? A. Well, I don't know. I suppose I could have got in——

Q. No; I don't mean to get in. I mean to sit up on the cross-bars. A. No sir.

Q. It would be trouble to pull yourself up there, would it? A. It would be quite a load when you had your hands full of stuff.

Q. Where was your left foot, Mr. McCloskey? A. My left foot? That was as far as I could get it along towards the south corner of the car, like I was standing on the east side.

Q. Show just exactly the position that your right foot maintained towards the car; was it at right angles to the edge of the car? A. I stood like that (indicating), on the ledge.

Q. It was at right angles to the ledge of the car wasn't it; it was not on a slant? A. It was on a slant, yes; along on a six-inch piece. I was trying to get my foot over.

Q. I understand that, but was your foot straight across the ledge or was it on a slant with the ledge? A. Lengthwise.

Q. Lengthwise or crossways? A. It was lengthwise as much as I could twist my feet around to have it.

Q. Was your left foot on the south side of the elevator or
56 the east side? A. My foot was on the side of the doorway; just like that (indicating).

Q. Turn around to that second figure. I don't understand whether your left foot was on the left side there. You see the second figure there. A. My left foot was right here (indicating).

Q. Which way was the toe pointed? A. Towards the door.

Q. Which way was the toe of the right foot pointed? A. The same way.

Q. Towards the door? A. Yes sir.

Q. What were you holding on to? A. I was not holding to nothing; there wasn't nothing to hold to.

Q. Is it not a fact that Mr. Locke used to repeatedly warn you to look out for those weights while you were riding on top?

Mr. HAYDEN: Objected to.

A. Never; he never did.

The COURT: He says he never did.

By Mr. DUVALL:

Q. Were you not warned just before this car started up to look out for the weights? A. No sir. I always told the men working there to look out for the weights and was careful myself.

Mr. DUVALL: I want to ask the witness to identify a signature on these cards. Do you want to look at them, Mr. Hayden? I think you have seen those.

Mr. HAYDEN: Yes; these are all right.

By Mr. DUVALL:

Q. Now, I will ask you to take these time cards and look them over and see if those cards contain your signature. Is that your signature on the first card (handing witness a card)? A. (After examination.) That is my signature.

Q. Look at the time on that and tell me if that is correct. The date of that card is June 17th, is it not? A. Yes sir; June 17th.

Q. How many hours of work that day? A. Eight hours. I could not recollect whether that is correct or not, but I expect it is.

Q. You were paid for eight hours that day? A. Yes sir.

Q. You worked eight hours on the 17th of June in the Hibbs Building? A. Yes sir.

Q. Is that correct? A. Yes sir.

Q. And you were paid for eight hours? A. Yes sir.

Q. Look at the next card. A. June 18th.

Q. Eight hours that day? A. Yes sir.

Q. Is that correct? A. I suppose it is.

Q. And you were paid for eight hours? A. I expect so.

Q. If you are in doubt about that, say so. A. I would not swear to it, but that is my signature.

Mr. HAYDEN: I think I may be able to shorten this pro-
57 ceeding. I have entered into a stipulation to admit all these time-sheets in evidence, and that they are correct.

Mr. DUVALL: The reason I want him to identify these cards is that I want to ask him what work he was doing on these different dates.

By Mr. DUVALL:

Q. I will ask you if between the 17th of June—the 17th, 18th,

19th and 20th—up to the end of June, if you can state what work you were doing? A. I could not.

Q. You worked full time during the first, second, fifth, sixth, eighth, ninth, tenth and twenty-ninth of July, 1907. Can you state what work you were doing? A. The twenty-ninth?

Q. Except the twenty-ninth when you made four and a half hours. A. I could not recall now.

Q. You can not say you were doing any work there then or not? A. I suppose I might have worked in there; I could not say whether I did or not.

Q. On the first of August there were eight hours that you put in. Could you tell what work you were doing on the first, second, third, sixth, and seventh of August? A. Is not that on the other building, the Union Trust Building?

Q. No; this is all the Hibbs Building. You put in eight hours on the first, four hours on the second, eight hours on the fifth of August, eight hours on the sixth of August, the seventh of August eight hours, the eighth of August eight hours. Those are the days previous to the accident? Now, can you tell us whether you were in that east shaft or the other shaft during those days? A. I cannot recall whether I worked in either one of them during those days.

Q. You would not say that you did not work in them? A. I would not say I did.

Q. But these three hours on the ninth of August—— A. Yes, I was hurt that morning and I was working there then.

Q. And you say that you were at the Garfield Hospital, Mr. McCloskey, for some weeks. Were you there for treatment all the time? A. Yes sir.

Q. You did no work while you were there? A. No sir.

Q. You started to say, in answer to a question put to you by your counsel, that after the elevator came down you directed the operator, and then you were stopped, and on the next question you changed that to say, "I asked him?" A. Yes sir.

Q. Why did you make a change from "I directed him"? A. Well, I asked him; it is all I could do.

Q. No; I mean why did you change the form of your answer? A. For the simple reason that I could not tell him what to do. I was not his boss or anything like that.

Q. Then you did not like the form of your first answer? A. I don't know about that. Of course it was up to me to ask him.

Q. That is the best explanation you can give for the reason you changed your former answer? A. Yes sir.

58 The witness being recalled further testified that he did not think Minte was in the District of Columbia at this time; that he went to Providence Hospital for a skin grafting operation which was performed by Dr. Mitchell. Skin about three and one-half inches by seven inches was taken from his thigh for this. The purpose of wearing the brace on his leg and ankle was to keep his foot from running sideways and getting crooked.

On cross-examination he testified that he thought he went to the Providence Hospital in the month of November; that at the time

of the accident the first set of blocks ran by him. It was somewhere in there (indicating on the drawing) the first set of blocks ran by him.

Examination of said witness being concluded, NEWTON D. RENNER was produced as a witness in behalf of the plaintiff and testified that he was a painter and decorator employed by the Robert E. Mackay Company on August 9th, 1907, and on said date was painting in the said elevator shaft at the Hibbs Building, with the plaintiff, and touching up spots; that they had come down to the first floor and he was standing on top of the elevator, at the front thereof, facing the door and that McCloskey was standing at his left, in the place where said McCloskey stood when he, McCloskey, finished work; that the top of the elevator was about ten feet below the second floor; that the plaintiff told Joseph Locke, the elevator operator, to take them to the second floor so they could get off and go underneath the car; that he did not hear Locke make any response; that Locke started the car shortly after; was about to stop at the second floor, just about paused, and then went on; that his back was to McCloskey and that he did not notice McCloskey's position after they started up; that he did not observe what effect the starting had on McCloskey; that they were taken above the fifth floor and then the car stopped suddenly; that he asked McCloskey what was the matter and McCloskey said his, McCloskey's, foot was caught; and that was the first he knew what happened.

Upon cross-examination by counsel for defendant, the George A. Fuller Company, the witness testified that he did not hear McCloskey make any commotion after the elevator passed the second floor and that the pause of the elevator did not have any effect upon him, Renner; that he did not notice anything while the elevator was going up and in a few minutes McCloskey was caught and that was all he knew; that on the day of the accident he made a statement to Mr. Fisher, superintendent for the George A. Fuller Company, telling how the accident occurred and that on that occasion he did not remember but possibly he might have said that the car did not stop at the second floor and that he might have said that he and McCloskey stood just where they were and did not change their positions; that on the day of the accident and while he and McCloskey were on top of the elevator they rode up and down quite often; that on the trip which the car made when the accident occurred he was holding on to the wire cables from which the car was suspended, and that
59 he and McCloskey did not stand on the cross bars on top of the car because they had only a short distance to go and did not need to.

Thereupon the witness was asked the following:

Q. How many times did you pass the fifth floor? A. That I don't know.

Q. Was that often or not? A. Well, I don't know. I could not say how often it was.

Q. Was it more than once or twice? A. You see they were hauling passengers up and down there now and then.

Q. That is not in response to the question. I asked you if you passed the fifth floor more than once? A. As well as I can remember we got on at the fifth floor and went on up to the top of the shaft and then came down, worked down to the bottom. But I think between that time we probably went up and down several times with passengers.

Mr. DUVALL: I ask that that part of the answer of the witness be stricken out.

The COURT: I think that is responsive.

Mr. DUVALL: I asked him how many times they passed, and he said something about passengers.

The COURT: I think he said he passed several times painting and several times carrying passengers. Is that what you said?

The WITNESS: Yes sir.

Mr. DUVALL: I did not so understand him.

Q. And you were on top all that time? A. Yes sir.

Q. And Mr. McCloskey was there, too? A. Yes; he was also there.

Q. Were you holding to anything when the elevator was going up the last time? A. Yes, I was holding to the wire ropes, the cable.

Q. That carries the car? A. Yes.

Q. What did Mr. McCloskey have hold of, if anything? A. I don't believe he had hold of anything; I don't know, though; I could not say.

Q. If there any reason that you know of why you could not have stood on those cross-bars on the top of the carriage? A. We could not work from those.

Q. I mean when you were not working; could not a person stand there? A. We had a short distance to go and we did not need to; we would just go up a short distance.

On redirect examination the witness testified that if they had been going beyond the fifth floor they would have prepared themselves.

The examination of the said witness being concluded, RAMSEY W. SCOTT, was produced as a witness in behalf of the plaintiff, and testified that he was in the elevator business and was the local manager of the Otis Elevator Company; that he knew that the Otis Elevator Company, a defendant in this case, was furnishing a man by the name of Joseph Locke for the running of an elevator, at the Hibbs building, but he could not state under what arrangement the
60 said Locke was so furnished, as any such arrangement was verbal and very likely made between the foreman of the Otis Elevator Company, in charge of the work at the said Hibbs Building, and a representative of the George A. Fuller Company; that he did not make the arrangement himself; that the said Joseph Locke, was the person referred to by witnesses in this cause; that the Otis Elevator Company supplied the man to run the aforesaid elevator and care for the machine; that said man ran the car during the day and cleaned the machine in the evening to have it in readiness for

the next day; that this elevator operator was paid by the defendant, the Otis Elevator Company, and that the George A. Fuller Company was charged $3.00 a day, by the Otis Elevator Company, for the running of the car by this man and the bills were paid by the said Fuller Company; and that the defendant, the Otis Elevator Company, had not formally turned over the elevator to Mr. Hibbs the owner of the Building.

On cross-examination by counsel for the defendant, the George A. Fuller Company, the witness testified that the operator was Joseph Locke and that he was carried on the time books of the Otis Elevator Company, defendant herein, and that the Otis Elevator Company charged the George A. Fuller Company $3.00 a day and double pay for overtime, which was for the service in running the car or elevator, and looking after the machinery; that he knew that on or about the 5th of March, 1907, the defendant, the George A. Fuller Company, requested the Otis Elevator Company to get a temporary elevator, one without a cage on it, in running order so that the George A. Fuller Company could get the use of it but did not recall when such temporary elevator was made ready or installed in the tracks; that the defendant, the Otis Elevator Company, had a separate and independent contract with Mr. Hibbs the owner of the building to construct the elevators in the aforesaid building; and that it was probably about June, 1908, although he does not remember the date, that the defendant, the Otis Elevator Company, turned the elevators over to the said owner and received final payment on said contract, under the certificate of the architect; that he could not recall when it was that the passenger cages were put in place upon the platforms of the aforesaid elevators; that he may have seen the painters using the aforesaid elevators; that Joseph Locke was continued in the employ of the Otis Elevator Company until the elevators were turned over to the owner, Mr. Hibbs, and remained in their employ for some time after the work of the Otis Elevator Company, installing the elevators in the Hibbs Building, was finished; that in the early part of the aforesaid work the said Joseph Locke was engaged in the erection of the aforesaid elevators and subsequent to that Locke took care of the elevators and machinery and cleaned them, also acting as the operator therefor;

Thereupon witness was asked the following:

"Q. And your company allowed those elevators to be used by the George A. Fuller Company and you charged them for such use; is that true? A. We charged them for the service of a caretaker and operator. That is the only charge that I recall.

61 "Q. I thought that that included the service of the machinery and elevator? A. We made no charge for the use of the machines. We charged them for some materials.

"Q. But you did make a profit on the operator's salary, on his wages? A. Yes.

And the witness further testified:

That the foreman of the defendant, the Otis Elevator Company, employed at the aforesaid Hibbs Building, kept an account of the time that the George A. Fuller Company used the elevator and that

said foreman reported the time, so taken as aforesaid, to the defendant, the Otis Elevator Company;

Thereupon the witness was asked the following:

Q. What became of the elevators after the George A. Fuller Company stopped using them; did you stop your elevators and take your man off them? A. We cleaned them and made such adjustments as was necessary to complete the plant.

"Q. I mean after the Fuller Company had completed the building and turned the building over to the owner, what did you do with the elevators; did you stop them *down* and take your men off or did you continue the elevators in operation until you turned the elevators over to the owner? A. No; I think that as soon as the Fuller Company had no further use for our man we took him away.

"Q. That is, it is your impression that you took him away, but you do not know personally, do you? A. He may have been there a short time afterwards giving instructions to the operators who were employed by the owner.

"Q. During the time that Locke was running that elevator, was he not also engaged in assisting to install your elevators in the building for the owner? You say he was a helper; was he not also engaged in that work? A. In installing elevators?

"Q. In helping to install; did he not only operate the elevator, but assist the mechanics in getting the plant ready to turn over to the owner? A. At that particular time he was furnished to the Fuller Company; he was engaged in nothing else. At that time he was simply running the car and taking care of the machine.

And the witness further testified:

That when a temporary elevator was installed, as aforesaid, to hoist building materials for the defendant, the George A. Fuller Company, the Otis Elevator Company started to operate the aforesaid elevator with the said Joseph Locke or some other employee of the said Otis Elevator Company but the hoisting engineers objected to that and the Otis Elevator Company was compelled to take its employee off and a hoisting engineer was employed in his stead while building materials were being handled: that after the Otis Elevator Company stopped running the elevator to hoist building material, it, the aforesaid Otis Elevator Company, put its own employee on the elevator again to operate it.

And thereupon the cross-examination of the said witness was suspended by counsel for defendant, the George A. Fuller Com-
62 pany, for the purpose of moving the Court to strike out certain parts of the testimony, on cross-examination of the witness, Wilson A. McCloskey, and thereupon the following colloquy occurred:

"Mr. DUVALL: Before I resume the cross examination of Mr. Scott, I wish to make a motion which I should have made at the conclusion of Mr. McCloskey's testimony, to strike out certain matter that was in there, on the ground that it is hearsay. My only excuse for not making the motion at the time is that at that particular time there were some interruptions and I over-looked the

matter until Mr. McCloskey left the witness stand. I will read from the testimony, of Mr. McCloskey:

"(Reading:)

"Q. Whom did Locke work for, do you know? A. He was working for the Fuller Construction People, I understood.

"Q. You understood that? A. Yes, sir.

"Q. Do you know whom he was working for? A. I am pretty sure of it. He told me so.

"Q. How do you know that? A. He told me he was.

"Q. Locke told you he was? A. He said he was paid by the Fuller People.

"I move to strike that out, because it is hearsay, and also it is a declaration by a servant that would not be binding on the Fuller Construction Company.

"The COURT: Well, gentlemen, it goes to the weight of the testimony and if it had come out in the examination in chief, I think I should have sustained the objection. But you were cross examining the witness. He repeated that several times as you insisted upon the inquiry. Now it will have to stay in there.

"Mr. DUVALL: It was not responsive to the question I asked him.

"The COURT: Just read it again.

"(Mr. Duvall read aloud the testimony as above recorded.)

"Mr. DUVALL (continuing): My question was directed to his personal knowledge and he responds with hearsay, and it is not responsive.

"The COURT: You see though, if that were allowed then cross examination might be indulged in and counsel take the chances of getting what they want, and if they did not care for it, ask that it be stricken out. Now that would not be proper, on the ground that this man was repeating the conversation.

"Mr. DUVALL: It is not entirely on the ground that this man was repeating conversation. It is on the further ground that the declaration of Locke to the witness was not one which would bind the George A. Fuller Company, and for that purpose was incompetent for evidence, under the decision in the Vicksburg case.

"The COURT: It is ruled every day that declarations made by motormen or conductors will not bind the corporation, and such an objection is sustained, but here you brought this out yourself. I don't think it would be proper to grant the motion, for the reason that it was brought out in cross examination and not objected to at the time.

"Mr. DUVALL: Your Honor will allow me an exception?

"The COURT: Yes."

63 And thereupon the witness further testified that the elevator operator, Joseph Locke, was first employed and placed on the pay roll of the Otis Elevator Company by the latter's superintendent who was supposed to pass upon Locke's qualifications as a workman.

Thereupon, the defendant, the George A. Fuller Company introduced in evidence the following invoice, admitted by counsel

to have been delivered by defendant, the Otis Elevator Company, to the defendant, the George A. Fuller Company, which was in words and figures, as follows:

PHILADELPHIA, August 14, 1907.

Geo. A. Fuller Company, Munsey Building, Washington, D. C.

"Hibbs Building."

To Otis Elevator Company, Dr.

F–2072. One man to take care of elevator and operate same during month of July:

	26 days at $3.00 for 8 hour day	$78.00
Overtime:	27 hrs. " $6.00 " " " "	20.25
		$98.25

F–2148. One man to take care of elevator and operate same from Aug. 1st to 15th.

	9 days at $3.00 for 8 hour day	$27.00
	6½ hours at $3.00 for 8 hour day	2.34
Overtime:—	½ " a day for 9 days at $6. per day	3.38
		$32.72

F–1976. 18 75 Amp. Noark Fuses 250 volts.
12 Reg. #F 7794 F–1 Noark Fuses.
25# Elevator Grease
18 Lubricating candles
2# Waste $19.75

$150.72

Report of Time on Hibbs Building (July).

July	1	9 hours	July	15	9 hours
"	2	9 "	"	16	9 "
"	3	10 "	"	17	9 "
"	5	9 "	"	18	9 "
"	6	9 "	"	19	9 "
"	8	9 "	"	20	9 "
"	9	9 "	"	22	9 "
"	10	9 "	"	23	9 "
"	11	9 "	"	24	9 "
"	12	9 "	"	25	9 "
"	13	9 "	"	26	9 "
			"	27	9 "
			"	29	9 "
			"	30	9 "
			"	31	9 "

64 Report of Time on Hibbs Building (August).

August	1	9	hours
"	2	9	"
"	3	9	"
"	5	9	"
"	6	9	"
"	7	9	"
"	8	9	"
"	9	9	"
"	10	9	"
"	12	1½	hrs.
"	13	1	"
"	14	3¾	"

The receipted voucher, showing payment by defendant, the George A. Fuller Company, to defendant, the Otis Elevator Company, of the aforesaid invoice, less certain counter charges, was then identified by the witness and introduced in evidence by counsel for the defendant, the George A. Fuller Company, the amount of the voucher being $65.00.

The witness further testified that he had copies of other bills for similar service covered by the aforesaid invoice, that was, for the operation of the elevators; that the elevator operator, Joseph Locke, was, he thinks, taken into the employ of the Otis Elevator Company previous to the construction of the said Hibbs Building, but about this he is not certain; that the arrangement referred to by him, in his examination in chief, which he understood existed between his company and the George A. Fuller Company related only to the use of a temporary make-shift elevator in the Hibbs Building for hoisting building material, and not for the services of a passenger elevator and that the George A. Fuller Company was to operate such temporary make-shift elevator, but at the time aforesaid he placed Joseph Locke upon the aforesaid temporary elevator to run it for the reason that the Otis Elevator Company was responsible to the owner for turning over the elevators in a satisfactory condition, and the Otis Elevator Company did not want the George A. Fuller Company to put on an inexperienced man; that the Otis Elevator Company wanted some one there who could look after the maintenance of the machinery; that previous to the time that the operator Locke was employed under this arrangement; a hoisting engineer ran the car and the said Locke was there to clean the machines and look out for them; that later the said Locke served the two-fold purpose;

Thereupon the witness was asked the following questions:

"Q. Do you not know that you started to operate that elevator with Locke or some other employee of the Otis Elevator Company, and that the hoisting engineer objected to that? A. Yes, I believe that is so.

"Q. And you had to take your man off? And you had to put a

hoisting engineer on while they were handling building material; is not that true? A. Yes; I believe that question came up.

65 "Q. After you stopped running the elevator to hoist building material you put your man back on again; is not that true? A. Yes, sir.

"Q. Mr. Scott you stated in answer to a question by the Court, on page 42 of the record, it appears, that you had no personal knowledge as to the arrangement between your company and the Fuller Company, but you thought you had some time-sheets, and a letter from Mr. Fisher, of the Fuller Company. Have you that letter with you? A. Yes. If I may leave the stand I will get it.

(Witness produced a package of letters.)

"Q. You need not take time to find that now. I want to ask you now about this man Locke. Where did you get Locke, where did the Otis Elevator Company get Locke? A. I don't know.

"Q. Who employed him? Did you employ him personally, or one of your foremen; who put him on your pay roll? A. Our superintendent usually employs workmen, and he probably did.

"Q. Did he pass upon Lock's qualification for that work? A. He would be supposed to.

"Q. The invoice and receipts which were shown to you yesterday and the statement of time which you charged the Fuller Company began on the 1st of July and ran to the 15th of August. That is correct, is it not? You remember this voucher which you gave (indicating)? Just look at that and state if it is correct? —. ——.

"Q. I will ask you to examine those papers in connection with that voucher and ask you if you have any knowledge of any other bills rendered to the Fuller Company for the service of that elevator or those elevators in the Hibbs Building? A. You mean other than in July?

"Q. Yes. A. Yes, sir; there are.

"Q. Bills for the use of the elevator? A. Yes, sir.

"Q. Have you those bills with you? A. I think I have carbon copies of them. You probably have the bills; that is, the Fuller Company has the bills.

"Q. Will you produce carbon copies you have of any bills you have against the Fuller Company? A. I think I have them here.

"Q. What I asked you was whether you had any bills against the Fuller Company for similar service to the Fuller Company, for the use or for the service which you covered in this invoice here; that is, for the operation of that elevator?

The WITNESS: Yes, I have some carbon copies of bills right here.

By Mr. DUVALL:

"—. Let me ask you about this. When was Locke taken into the employ of the Otis Elevator Company, was it previous to the construction of this Hibbs Building? A. I think so, although I am not certain.

"Q. Was it not a fact that the arrangement which you understood existed between your company and the George A. Fuller Company

related merely to the use of what is termed a temporary
66 make-shift elevator in that building for hoisting building materials, and not for the services of a passenger elevator? A. Yes.

"Q. If that be so, who was to operate that temporary make-shift elevator—you, or the George A. Fuller Company? A. The George A. Fuller Company.

"Q. The George A. Fuller Company was to operate that? A. Yes.

"Q. Then, why did you put Locke upon the elevator—he being your employee—why did you put him there to run that temporary elevator? A. For the reason that we were responsible to the owners for turning over the elevators in a satisfactory condition, and we did not want them to put on an inexperienced man. We wanted someone there who could look after the maintenance of the machinery. Previous to the time that Locke was employed under this arrangement, an engineer, I think a hoisting engineer ran the car, and Locke was there to clean the machines and look out for them. Later Locke served the two-fold purpose.

"Q. Let me ask you this. Is it not a fact that at that time you did not carry Locke upon the time book of the Otis Elevator Company, and did not pay him; the time you sent Locke there to operate that make-shift or temporary elevator, is it not a fact that he was on the time books of the Fuller Company, or his wages paid by them? A. I know that on the date of the accident——

"Q. No; I am asking another question. I will ask the stenographer to read the question.

(The stenographer read the question as above recorded.)

By Mr. DUVALL:

"Q. Do you understand the question?

Mr. FLANNERY: I think that is a very indefinite question.

Mr. DUVALL: I will add to that question, this then:

"Q. That was prior to July, 1907? A. I don't know.

"Q. You don't know that? You have already stated that you know that you were to furnish Locke, and that there was protest from the hoisting engineers? A. Yes.

"Q. And Locke was taken off, and the Fuller Company then had to employ hoisting engines. What was done with Locke then; was he still continued in the building to look after the machinery and the elevators, to see that they were properly kept up? A. To what time have you reference?

"Q. Prior to July, 1907; prior to the day of this voucher (indicating)? A. That, I do not recall.

"Q. Is it not a fact that after the hoisting of building material had ceased in that building, this arrangement, the Fuller Company made, ceased and at the time you installed the passenger cages upon those platforms you then put Locke back upon the time books and pay roll of the Otis Elevator Company and put him inside the car and made him look after the car and machinery? That was the end

of June, was it not, 1907? A. Why did the Fuller Company pay for his time if he was not rendering them a service?

"Q. Don't ask me questions; I am asking you a question. I want to ask you Why was it that Locke was carried on the pay roll of the Fuller Company up to the time that you put passenger cages on, but after that you took him back in your employ and he took full charge of the car and ran the car and you made him look after the machinery?

Mr. FLANNERY: I do not see that that is material at all.

The COURT: The objection is sustained on the ground that it assumes something that is not in the testimony.

Mr. DUVALL: I will withdraw the question, then and put it in this form.

By Mr. DUVALL:

"Q. Have you any more definite idea now than you had yesterday as to when you installed your passenger cages on the platform? A. No.

"Q. Prior to July, 1907, was it not? A. I don't know.

"Q. I will ask you why was it that Locke was taken into the employ of the Otis Elevator Company on or about July 1st, 1907, when you state that he was paid by the George A. Fuller Company some time while that temporary elevator was being used?

Mr. FLANNERY: I object to that question. I do not think we ought to assume facts that are not in evidence. If Mr. Duvall has any facts in reference to Lock's prior service, he can go to work and put those facts in evidence and examine Mr. Scott; but I do not think it is proper to assume facts that are not in evidence and try to bring out an answer to confuse the witness.

Mr. DUVALL: This witness has testified that these were the bills rendered to the Fuller Company for the service of the elevator and for the operator; that is for the full use of the machines. And that was according to the statements he has made. Of course, that is contrary to our contention; but nevertheless it is in evidence that on the 14th of August, they rendered bills in a certain sum, for $150.72, for different items, such as taking care of elevator and operating the same, and for fuses, elevator grease, lubricating candles and waste, and so forth. It also appears that Locke was the man who was running this elevator. Further, it appears that this man Locke was in the employ of the Otis Elevator Company and he was selected by the Otis Elevator Company. He was sent there to look after the machinery of the Otis Elevator Company. He was paid by the Otis Company. In other words, prior to July 1st, 1907, he was paid by the Fuller Company, for some time prior to that; and then on the first of July they commenced to pay him and charge it to the Fuller Company, a different amount of wages. Now I ask you why that was?

The COURT: Is that your question why that is?

Mr. DUVALL: Yes, why it was that there was a transfer of this man from the books of the Otis Elevator Company to the Fuller

Company. When the temporary elevator was in place, he was transferred to the Fuller Company, and then afterwards he was transferred back from the Fuller Company to the Otis Company.
68 That was at the time this bill was rendered, or at least at the first date in this bill.

The COURT: If that is what your question means I do not understand it.

Mr. FLANNERY: Where is the evidence of transfer?

Mr. DUVALL: In the statement of the witness that this bill covered services, for an operator, and the testimony is that Locke was running that elevator all the time.

Mr. FLANNERY: But where is evidence of transfer from one pay roll to another?

(Further discussion followed.)

The COURT: Ask the direct question. I do not recall now what the witness said about that. Ask him, in the first place, whether they did transfer him from their books.

Mr. DUVALL: I will accept your Honor's suggestion and ask that question. I was under the impression that I had put it before.

By Mr. DUVALL:

"Q. Is it not a fact that when you sent Lock to the Hibbs Building the George A. Fuller Company then paid his wages, and not the Otis Elevator Company? A. May I say to the Court——

The COURT: No; answer yes or no first, and then make any explanation you wish to.

"A. My recollection in that regard is too indefinite to be able to answer the question.

"Q. What do you mean by "too indefinite"? Have you any knowledge as to that at all? You stated yesterday that you had time sheets showing that this man was charged to the Fuller Company at this time, did you not? A. Yes, sir.

"Q. Now, did those time sheets also show whether he was charged to the Fuller Company in April of the same year? A. I don't recall. I can look at the time sheets and see.

"Q. Suppose you do, then, Mr. Scott.

Mr. FLANNERY: While the witness is looking for that, your Honor, I simply want to suggest to the Court that it seems to me that this whole line of examination is utterly immaterial to the issues here. We are not concerned with what arrangement existed between the Fuller Construction Company and the Otis Elevator Company at the Hibbs Building prior to the time of the accident or in reference to some other building prior to the time of the accident. We are concerned with the arrangement in force at the time of the accident

(Argument and discussion followed.)

The COURT: As I have tried to suggest several times, I must confess that I have been confused myself as to what was being sought. I thought it was to test the witness.

Mr. DUVALL: This is to that point; also testing his credibility.

69 The COURT: I do not exactly see how you can test his credibility by trying to show that in April there was some arrangement made that was terminated the first of July. As I understand, you insisted that something was done that the witness agrees to.

Mr. DUVALL: I merely asked him the question why that was, why he took this man Locke back when passenger elevators were installed, when the cages were put on.

Mr. FLANNERY: I believe in confining the testimony to the issues of the case. I see no reason for testing the credibility of the witness, a witness whose credibility has not been attacked. I see no ground for such a suggestion.

Mr. DUVALL: Well, I will put it in another form. I do not want to hurt the feelings of the witness.

The COURT: What was the question?

Mr. DUVALL: I asked him why it was that this man was transferred?

(Upon request the stenographer repeated the question as follows:)

"Q. Now, did those time sheets also show whether he was charged to the Fuller Company in April of the same year? A. I do not recall. I can look at the time sheets and see.

"Q. Suppose you do, then, Mr. Scott."

The COURT: You can answer that question.

By Mr. DUVALL:

"Q. Can you ascertain whether in April Mr. Lock was on those time sheets? A. The time sheets which I have for April are for making some repairs which have no reference to this running of the passenger car. I have some time-sheets for May, for nearly the whole month of May.

"Q. No; I asked you about April? A. I see none for April.

"Q. Then, what have you to say as to whether he was in the employ of the Otis Elevator Company in April or not?

Mr. FLANNERY: I object to that.

The COURT: Objection sustained, and you may have an exception.

Mr. DUVALL: Now I will renew the question I put before. I do not think it was answered.

The COURT: What was it?

By Mr. DUVALL:

"Q. Why was it the Otis Elevator Company did not pay Lock for services at the Hibbs Building between the time that he was sent there by the Otis Elevator Company, some days between the time he was sent there and the first of July, and was afterward paid directly by the Otis Elevator Company and not by the Fuller Company?

Mr. FLANNERY: We object to that.

The COURT: Objection sustained.

Mr. DUVALL: We ask your Honor to note an exception.

70 The COURT: The objection is sustained on the ground that the question assumes a state of facts, which has not been proven.

Mr. DUVALL: The Court will allow an exception.

The COURT: Yes.

By Mr. DUVALL:

"Q. There is no question, is there, that Locke was in your employ at the time these bills were rendered, from July, 1907, on; is there? A. No.

Thereupon the witness having been asked the following:

"Q. Then what have you to say as to whether he was in the employ of the Otis Elevator Company in April or not?

To which counsel for the defendant, the Otis Elevator Company thereupon objected and the court sustained the objection and counsel for the defendant, the George A. Fuller Company, then and there excepted to the ruling of the Court.

Thereupon the witness having been also asked the following question:

"Q. Why was it the Otis Elevator Company did not pay Locke for services at the Hibbs Building between the time that he was sent there by the Otis Elevator Company, some days, between the time he was sent there and the first of July, and he was afterwards paid directly by the Otis Elevator Company and not by the George A. Fuller Company?"

To which said question counsel for the defendant, the Otis Elevator Company, objected and the Court sustained the objection, on the ground that the question assumed a state of facts not proven; and thereupon counsel for the defendant, the George A. Fuller Company, then and there excepted to the ruling of the Court.

The witness further testified that there was no question that the said Locke was in the employ of the Otis Elevator Company during the period covered by the aforesaid invoice, from July 1907, on; that during that period, the elevator operator, Joseph Locke, could not have been discharged by the George A. Fuller Company; that the defendant, the George A. Fuller Company, had no authority to discharge the said Locke while he was at work about the said elevators or while operating the said elevators during the aforesaid period, and that they did not have any such authority on the day of the accident to the plaintiff, that is, on the 9th day of August, 1907; that the George A. Fuller Company could only have made a request of the Otis Elevator Company to discharge Locke, and if the reasons warranted it, he, the said Joseph Locke, would have been discharged; that the defendant, the George A. Fuller Company, had no authority, on the date of the accident, to take the said elevator operator, Joseph Locke, off the elevator in question and substitute another operator in his place there; that the George A. Fuller Company could have made a request to the Otis Elevator Company to substitute another operator for him; that the superintendent of the Otis Elevator Company placed the said Joseph Locke at work

71 in the Hibbs Building for the purpose of running the said elevator and that the George A. Fuller Company had nothing to do with the selection of the said Locke as an employee for the purpose of running the said elevator, on the date of the accident, or at any other time; that he, the witness knew, during July or August of 1907, to what use the elevators were being put by the painters for their work; that he knew that the George A. Fuller Company turned the said building over to the owner, Mr. Hibbs, long prior to the time he turned the elevators over and received final payment therefor; that in the interval between the turning over of the building by the George A. Fuller Company and the acceptance of the elevators by the owner the elevators were continued to be run but they were not operated by employees of the Otis Elevator Company; thereupon the witness was asked the following question:

"Q. Did you ever have any arrangement with Mr. Hibbs for the operation of those elevators after the Fuller Construction Company completed the building and the tenants were in there?"

To which question counsel for the defendant, the Otis Elevator Company, objected and the Court sustained the objection and thereupon counsel for the defendant, the George A. Fuller Company, then and there noted an exception.

Thereupon the witness was immediately asked the following question:

"Q. Was he (meaning Joseph Locke) employed by someone else or was he in turn employed by Mr. Hibbs?"

To which question counsel for the defendant, the Otis Elevator Company, objected and the Court sustained the objection, and thereupon counsel for defendant, the George A. Fuller Company, noted an exception.

The witness then testified that he did not recall that the Otis Elevator Company had any interest in the running of the elevators, subsequent to the date of the accident and thereupon witness was asked the following question:

"Q. Who took Locke off then?"

To the answering of which, counsel for the defendant, the Otis Elevator Company, objected, on the ground that it was subsequent to the accident, and the Court sustained the objection, to which ruling of the Court counsel for the defendant, the George A. Fuller Company, duly excepted.

At the time of noting the exception counsel for the George A. Fuller Company stated to the Court the purpose of the question was to ascertain who dispensed with his (Locke's) services and for the further purpose of showing the employment.

On further cross examination the witness then testified that he did not recall the reason why the George A. Fuller Company was not permitted to put an operator in the car during the period that he billed the said George A. Fuller Company during July and August and the date of the accident herein; that he doubted very much that he would have permitted the George A. Fuller Company to have any other man to run the aforesaid elevator, owing to the

cars being nearly completed and the necessity of the Otis
72 Elevator Company keeping the machines in good order, inasmuch as it was responsible to the owner to turn them over in good condition.

On cross examination, by counsel for defendant, the Otis Elevator Company, the witness testified that the aforesaid invoice to the George A. Fuller Company did not include anything for the use of the elevator itself; that no bill was rendered to the George A. Fuller Company for the use of said elevator during the time covered by the said invoice; that no bill was rendered to the George A. Fuller Company for the use of the machine, for elevator service during that time; that the aforesaid invoice which his company rendered to the George A. Fuller Company for the service of a man to take care of the elevator and operate same during the months of July and August, up to and including August 9, did not cover any work which that man did for the Otis Elevator Company during the time covered by said invoice; that during the period of time covered by the aforesaid invoice, the said elevator operator was in a way subordinate to the Otis Elevator Company's foreman, who had charge of that work in the Hibbs Building but during that time the said operator was ordered when to use the elevator for it and when not to use it, by the George A. Fuller Company's representative; that he had no knowledge of his company ordering the said Locke to do any work for his company, during the time Locke was operating the car; that if any complaints were made to the Otis Elevator Company by the George A. Fuller Company concerning the said Locke they never reached him; that only those complaints of a serious nature would probably have come to his attention; and if the George A. Fuller Company had requested him to replace the said Locke with another operator, such request would undoubtedly have been granted.

Thereupon on further cross examination by counsel for defendant, the George A. Fuller Company, permission being granted for same by the Court, the witness testified that the said Joseph Locke reported to the Otis Elevator Company, this accident to the plaintiff.

On redirect examination the witness further testified that the defendant, the George A. Fuller Company, was the general contractor for the construction of the aforesaid Hibbs Building but that the Otis Elevator Company's contract for the elevators constructed and installed by the said Otis Elevator Company, was not made with the George A. Fuller Company but was a contract between the Otis Elevator Company and Hibbs and Company.

On recross-examination, by counsel for the defendant, that George A. Fuller Company, the witness further testified that during the period covered by the aforesaid invoice to the George A. Fuller Company, the elevator operator, Joseph Locke, may have put in part of a day for the Otis Elevator Company and part for the George A. Fuller Company but he could not say as to the exact arrangement in each day; that all that the George A. Fuller Company had to do with the elevator and the operator, was to tell the operator what floors to go up to, when to stop, what to carry up, and to say how

long they wanted the operator; that this was arranged with the elevator operator, and that he, the said operator kept the time.

73 The examination of said witness being concluded, the plaintiff, to maintain the issues on his part joined, introduced in evidence, the contract between the defendant, the George A. Fuller Company, and the Robert E. Mackay Company, dated December 24, 1906; the letter of proposal for doing the aforesaid painting work, dated December 14, 1906, from the said Robert E. Mackay Company to the said defendant, and an order for extra work from the said defendant to the said Robert E. Mackay Company, dated February 26, 1908, which were, in words and figures, as follows:

Robert E. Mackay, Pres. & Mgr. | Joseph J. Mooney, Vice Pres. & Supt. | Robert H. McCork, Coun. & Sec.

Robert H. Mackay Company,
Painting and Decorating,
208 West 17th Street.

NEW YORK, Dec. 14, 1906.

Re Hibbs Building.

Geo. A. Fuller Co., Munsey Building, Washington, D. C.

GENTLEMEN: We propose doing all painting, hardwood finishing, lettering etc., on the above building according to the revised plans and painting specification, but not including the back painting of plumbing fixtures for the sum of twenty-four hundred—2400—dollars.

NOTE.—In case elevator fronts from second story up are painted two coats of drop black, add sixty-eight—68—dollars.

Respectfully,

ROBERT E. MACKAY CO.
ROBERT E. MACKAY.

The contract was in words and figures, as follows, all paragraphs thereof not material to the issues in this cause, being omitted:

No. 21.

Agreement, made December 24th, 1906, between the Robert E. Mackay Company of New York City, hereinafter designated the Sub-Contractor, and the George A. Fuller Company, a corporation organized under the laws of *the* New Jersey, hereinafter designated the Contractor.

Witnesseth that the Sub-Contractor, in consideration of the fulfillment of the agreements herein made by the Contractor, agrees with the said Contractor, as follows:

First. The Sub-Contractor, under the direction and to the satisfaction of Messrs. Bruce Price and de Sibour, Architects, shall and will provide all the materials and perform all the work mentioned

in the specifications and shown on the drawings prepared by the said architects and identified by the signatures of the parties hereto for all the exterior and interior painting and decorating, in ac-
74 cordance with the plans and specifications and addenda to same, as identified by the signature of the sub-contractor, for the Hibbs Building located on Fifteenth Street, between New York avenue and H street, N. W., Washington, D. C.

This contract to include all painting with the exception of the structural steel, the shop coat on the ornamental iron, and the priming of frames and sash.

Second. (Relates to drawings and explanations and is omitted because not material to the issues in this cause.)

Third. It is further understood and agreed that the Sub-Contractor shall not, under any circumstances be entitled to allowance for any extra work unless the Sub-Contractor shall produce a written order to do such extra work signed by a properly authorized officer or agent on behalf of the Contractor.

Fourth. (Relates to facilities for inspection by Architect and Contractor and is omitted because not material to the issues in this cause.)

Fifth. (Not material to the issues in this cause and therefore omitted.)

Sixth. (Not material to the issues in this cause and therefore omitted.)

Seventh. (Not material to the issues in this cause and therefore omitted.)

Eighth. (Not material to the issues in this cause and therefore omitted.)

Ninth. (Not material to the issues in this cause and therefore omitted.)

Tenth. (Not material to the issues in this cause and therefore omitted.)

Eleventh. (Not material to the issues in this cause and therefore omitted.)

Twelfth. (Not material to the issues in this cause and therefore omitted.)

Thirteenth. (Refers to payment and in substance is as follows:) It is hereby mutually agreed between parties hereto that the sum to be paid by the Contractor to the Sub-Contractor for said work and materials shall be two thousand, four hundred ($2,400), and that such sum shall be paid in current funds by the Contractor to the Sub-Contractor, in installments, as the work progresses. * * *

Fourteenth. The Sub-Contractor shall complete the several portions and the whole work comprehended in this agreement by and at the time or times stated below:

The Contractor shall keep in touch with the progress of the general work and shall install his work at such times as not to delay or conflict with other work.

The Sub-Contractor shall prepare all materials in sufficient time to be ready to install any portion of his work, and he shall begin to

install such portions as the contractor may direct upon three (3) days' notice from the contractor.

The sub-contractor shall at all times make progress satisfactory to the contractor, failing which the 5th and 7th clauses above shall be the penalty.

75 Fifteenth. No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the Contractor. * * * (The remainder, indicated by stars, is not material to the issues in this cause and is therefore omitted.)

Lastly. This agreement shall bind the executors, administrators, successors, and assigns of the parties hereto.

In witness whereof, the parties hereto have signed this agreement.

GEORGE A. FULLER COMPANY,
By JAMES BAIRD, *Mgr.*
ROBERT E. MACKAY CO.
JOS. MOONEY, *V. P.*

In presence of—
—— ——.

Order for Extras.

No extra work will be paid for except upon written order signed by the George A. Fuller Company by its authorized agent as written in original contract.

No. —. $75.75.

George A. Fuller Company,
Munsey Building.

WASHINGTON, D. C., Feb. 26, 1908.

To Robert E. Mackay Co., New York city:

We hereby accept your proposition dated —— —— for the following described work at the Hibbs Building, viz:

Re-lettering 2nd, 6th and 7th floor toilet room doors, touching up walls in elevator shaft, also repainting walls of 10 office closets, and adjustment of charge for cleaning floors and you are hereby authorized to add the sum of Seventy-five 75/100 dollars ($75.75) to your contract dated Dec. 24, 1906, for the painting work on the above mentioned building, Hibbs.

It is understood that the above work must be done in accordance with the plans and specifications of Messrs. Bruce Price & de Sibour Architects, and to their satisfaction.

Yours very truly,
GEORGE A. FULLER COMPANY,
By JAMES BAIRD, *Manager.*

Thereupon the plaintiff to maintain the issues on his part offered in evidence and read to the jury the deposition de bene esse of Robert E. Mackay. The witness testified that he was the president

of the Robert E. Mackay Company at the time that the said Company under its contract with defendant, the George A. Fuller Company, did the painting and hard wood finishing in the Hibbs Building on 15th Street between New York Avenue and H Street, Northwest, in Washington, D. C., and the witness thereupon pro-
76 duced a duplicate original of the said contract and the same was introduced in evidence by the plaintiff and attached to the deposition of the witness and the said contract was in words and figures the same as hereinbefore set out; the witness further testified that the labor required by the aforesaid contract was employed and paid for by the said Robert E. Mackay Company who had a foreman in Washington to superintend the work; that the said foreman was Robert E. Minte; that in the course of the Robert E. Mackay Company's work in the painting of the Hibbs Building it used the elevator to paint the elevator shaft as they always did in big buildings and the general contractor in this instance charged therefor as is the universal custom in the same work; that the Robert E. Mackay Company paid One Dollar an hour to the George A. Fuller Company for the use of the elevator and thereupon the witness, on request of counsel for the plaintiff, produced an invoice rendered to the Robert E. Mackay Company by the George A. Fuller Company and the said invoice was introduced in evidence by the plaintiff and attached to the deposition of the witness, and was in words and figures as follows:

(Copy.)

WASHINGTON, D. C., Aug. 19, 1907.

Robert E. Mackay Co., New York City.

19. To George A. Fuller Company, Dr. Building Construction, Munsey Building.

Hibbs Building.

All claims for errors must be made within five days.

For use of electric elevator in painting elevator shaft and tracks.

July	29.	4	hrs.	at	$1	.....	$4.00
Aug.	3.	1	"	"	"	.....	1.00
"	5.	6	"	"	"	.....	6.00
"	7.	5	"	"	"	Chgd.....	5.00
"	8.	6	"	"	"	.....	6.00
"	9.	3	"	"	"	.....	3.00
							$25.00

And thereupon the witness further testified that the aforesaid invoice was paid by the Robert E. Mackay Company; that the contract for the hire of the use of the said elevator from the George A. Fuller Company was not in writing; that he did not know by whose employee the said elevator was operated; that it was not op-

erated by his employee; that during the time that the Robert E. Mackay Company hired the said elevator for the purpose he had stated, his company used it for painting the elevator shaft
77 and that his company had the use of the said elevator for the time it was charged for; that during the time his company had the said elevator in use, no one else had the right to use it; that the George A. Fuller Company charged him only for the time he used the elevator to paint the shafts; that the name of his foreman was Robert Minte; that the plaintiff was in the employ of the Robert E. Mackay Company on August 9, 1907 and was at work in the Hibbs Building.

Upon cross examination by counsel for defendant, the George A. Fuller Company, the witness testified that the hiring of the said elevator by the Robert E. Mackay Company also included the hiring of an operator for the same and that he supposed the Robert E. Mackay Company's painters who were working on top of the said elevator, directed the movements of the same while the shafts were being painted and that they told the operator to go up or down.

Upon redirect examination the witness testified that he himself did not hire the operator and that he did not have any control of the operator nor the right to discharge him; that he had the right to direct him where to stop and when to go on to suit the convenience of his workmen and that so far as he knew that was all of the control which the Robert E. Mackay Company had over the elevator operator.

Upon recross examination the witness testified that the only persons who had any say as to the movements of the said elevator were the plaintiff and the other men supposed to be on the said elevator and also the foreman of the Robert E. Mackay Company; and that whoever was on the elevator doing the painting, was the only one who could say anything as to its movements.

Thereupon the plaintiff to further maintain the issues on his part, introduced in evidence and read to the jury, the deposition de bene esse of ROBERT MINTE. The witness testified that he was employed by the Robert E. Mackay Company of New York City, as foreman, and had been in such employ nearly three years; that on the 9th day of August, 1907, the Robert E. Mackay Company was employed by the George A. Fuller Company and was engaged in painting the elevator shaft of the aforesaid Hibbs Building and that the plaintiff was then in the employ of the said Robert E. Mackay Company; that the said Robert E. Mackay Company had the use of the elevator in the said building on the date aforesaid and that he made the arrangement for the use of the said elevator, with Mr. Baird, the manager of the George A. Fuller Company and in answer to a question by counsel for the plaintiff, to state the fact about the hiring of the said elevator, its extent, and what it was to include, the witness testified as follows, the exact language of the witness being quoted here:

"A. Well, we hired the elevator for the purpose of painting the shaft. I went to see Mr. Baird a couple of months before that time,

and made arrangements with him to use the elevator for the painting of the shaft, with the understanding that I was to use this elevator, and no passengers were to be carried, and I was to turn it over to the George A. Fuller Company at any time that they had
78 any material to carry on it—these were the arrangements that I made with Mr. Baird."

And thereupon the witness further testified that he did not make any arrangements as to the terms of payment.

Thereupon the witness was asked the following question:

"Q. What did the hiring of the elevator include—as to motive power, operator, use of elevator, and so forth? A. Well it included everything—the men to run it and all, because I did not have any man to run it.

And the witness further testified: That his Company did not pay the operator and he did not know who did; that he did not know who paid for the motive power but the Robert E. Mackay Company was charged for the whole; that he had no control over the elevator operator; that it was customary to paint the elevator shaft from the top of the elevator and if they had used scaffolding instead, they would have had to shut down the elevators entirely. In the testimony of the witness up to this point there was no statement by him that the Robert E. Mackay Company had no control over the operator and thereupon the witness was asked the following question-:

"Q. You have stated that you, or the Robert E. Mackay Company had no control over the operator. A. No; I had not, and the Company had none."

"Q. None whatever? A. Well, just to tell them where to go and where to stop of course I had that; the control over the men."

"Mr. DUVALL: I object to that question as leading, and as containing a misstatement of the answer of the witness."

And thereupon counsel for defendant, the George A. Fuller Company urged the said objection before the Court but the said objection was overruled and counsel then and there excepted to the ruling of the Court.

And the witness further testified that the only control which he had over the aforesaid operator was to tell him when he wanted him to stop and start while his men were on the car and also where to go to and that his men while using the car had the same control that he had; that it was up to his men to give the orders while they were working on the car; that he did not know who had the right to discharge Joseph Locke, the elevator operator, or who had any control of that character over the said Locke, but the Robert E. Mackay Company did not have it; that he did not know how the said operator came to be on the said elevator, nor whose work he was doing.

Upon cross examination by counsel for defendant, the George A. Fuller Company, the witness testified.

"Q. You say that the elevator was hired by you for the Robert E. Mackay Company? A. Yes.

"Q. Was it hired by the day, or by the hour? A. By the hour I know.

"Q. And during that hour, or that time, did you have
79 exclusive use of that elevator, or of those elevators? A. Well, some times I did not have it half an hour when I had to give it up again, so you see I never had it, perhaps for a full hour at the time.

"Q. For what purpose did you have to give it up? A. For carrying material.

"Q. Well, did you have any request to give it up for the purpose of carrying material, and, if so, from whom? A. Well, Fisher requested it—he was the superintendent—he came to me and asked for it.

"Q. He was superintendent for whom? A. For the George A. Fuller Company.

"Q. Well, what occurred on any occasion when he requested the use of the elevator car for moving material? A. Well, this Mr. Fisher came to me and requested me to take my men off the car so that he could have the car for carrying up his material.

That the said superintendent always came to him with the request for the use of the elevator whenever he wanted to carry up material for the George A. Fuller Company and that he never knew of an instance when the said superintendent ever took the elevator from the Mackay Company and used it for any purpose without consulting him; that the superintendent had occasion to use it eight or ten times prior to August 1, 1907, and each time he, the superintendent, went to him, the witness, and requested him, the witness, to take his men off the car so that he, the superintendent could have the car to carry up his material; that he kept the time that he used the said elevator for the Robert E. Mackay Company, by noting the time when his men went on the car and the time when the men left the car and that this was true of the time his Company used the said car or elevator on the 9th of August, 1907, the date of the accident; that his company, on said day, used the said east elevator, mentioned in the plaintiff's declaration, between three and four hours; that on one occasion prior to August 9th, 1907, he ascertained that the said operator had carried passengers up in the elevator during the time that his Company had rented the said elevator and he spoke to the operator about it; that the operator, the said Joseph Locke, told him on that occasion that he would not take any orders from him, or from Mr. Fisher, who was then the superintendent of the George A. Fuller Company, and that he would only take his orders from the Otis Elevator Company; that this was the only instance, to his knowledge, when the said operator carried passengers during the time he had rented it for the Robert E. Mackay Company; that the arrangement between him and the said Mr. Baird, the manager of the George A. Fuller Company, was that at such times as he needed the elevator, he could have the exclusive use of it and that the only

exception thereto was to be when the George A. Fuller Company wanted to haul material, the Robert E. Mackay Company would turn the said elevator or elevators over to the said George A. Fuller Company upon request; that he had the authority to stop the use of the said elevator or elevators and told his painters when to stop the painting in the shafts, and that whenever he wanted to stop using the said elevators he took his men off; that on the day of the
80 accident his painters were touching up some spots in the elevator shaft which had been replastered and that for this purpose the said elevator was stopped and held at different points in the said east elevator shaft; that he did not know of any interruption to the running of the car or elevator by the Robert E. Mackay Company during the three or four hours on August 9th, 1907, that the said Robert E. Mackay Company was using it; that the work which the Robert E. Mackay Company did in the elevator shafts consisted of the painting of the walls thereof and the structural iron work, comprising all I-beams which entered the wall, the grating above the shafts and all other iron work therein, including the elevators, front doors and also the sides; that he did not know what the arrangement was between the Robert E. Mackay Company and the George A. Fuller Company, concerning the pay for the said elevators, nor what it was to include; that on the occasion when he told Mr. Fisher, the superintendent of the George A. Fuller Company, about his, the witness's, discussion with the aforesaid elevator operator relative to carrying people inside of the elevator during the period when the Robert E. Mackay Company had hired the said elevator, the aforesaid Fisher told him that he, the said Fisher, "can do nothing as the men will not take any order from me;" that on the same occasion he spoke to another employee of the George A. Fuller Company about it and told him that the elevator was carrying passengers, and that he, the witness, did not think it was right, as the Robert E. Mackay Company was paying for the use of the car, and he, the witness, could not keep track of the time the Robert E. Mackay Company used it, and that he did not intend to pay for the car while it was carrying passengers; that the only passengers carried were mechanics, but whose he did not know; that the Robert E. Mackay Company was using the aforesaid elevator as a sort of movable stage and that his painters had the authority in his absence to give the orders to the aforesaid operator where to take them to and where to stop, that is, where they had their work to do; that it would have been more expensive to have used a stage, constructed from the bottom of the elevator shaft up, than painting from the top of the aforesaid elevator, but he could have done it, although that would have tied up the elevator.

On redirect examination the witness testified that he could have also used a swinging scaffold to paint the aforesaid elevator shaft but it would have tied up the elevators by doing that and would have inconvenienced the Robert E. Mackay Company and everybody in the building besides tying up the elevators; and that his arrangement with Mr. Baird as aforesaid, was for the whole use of the elevator, the operator, the power to run it and all.

Thereupon the witness testified as follows:

Q. I will ask you—when you hired the elevator from the George A. Fuller Company, what did that hiring include—in other words, what was their company to furnish to the Robert E. Mackay Company?

Mr. DUVALL: I object to the question as being a repetition;
81 also on the ground that the witness has fully testified in his examination in chief as to the arrangement which he made with Mr. Baird, as to the use of these elevators.

A. Well, my arrangement was for the whole use of the elevator, operator and all.

Q. How about the power to run it? A. It was not spoken of; of course I had to have the power to run it.

Q. A question was asked you a while ago by Mr. Duvall as to what you knew of your own knowledge as to what was included in the hiring of that elevator, and what was to be paid for it, and that is the reason I asked you the preceding question—your answer to that question was "No." Do you desire to make any explanation of that answer?

Mr. DUVALL: I object to that question on the ground that misquotes counsel for the defendant; also on the ground that the witness has fully answered the question; and further, that the question is leading and highly suggestive of the answer required of this witness.

A. I cannot give you any explanation on that at all; I don't know anything about that.

Q. About what are you speaking now? A. The talk there is about the money matter.

Q. Then, when you answered "No" you had reference to what was paid and not what was included in the hiring? A. That is it.

The foregoing questions and answers were read to the jury, none of the objections thereto being urged by counsel.

On recross examination the witness further testified that he told counsel for defendant, the George A. Fuller Company, sometime prior to the giving of his deposition, that his, the witness' arrangement with the said Mr. Baird was that he, the said witness, should have this car, and no passengers were to be carried and that he was to have the exclusive use of the same for his painters and that the only time that he was to give up the said elevator was when the George A. Fuller Company wanted to carry up material and then the George A. Fuller Company, through its building superintendent would make the request for the said elevator, directly to him, the witness, who was then to turn it over to the George A. Fuller Company.

On cross examination, by counsel for defendant, the Otis Elevator Company, the witness testified that on August 9, 1907, the building aforesaid was nearly completed and there were tenants in it; and that the painting work by the Robert E. Mackay Company was completed December 16, 1907.

Upon further redirect examination, the witness testified that the Robert E. Mackay Company was engaged from May 15th to December 16th, 1907, in the painting of the elevator shafts.

Thereupon the plaintiff, further to maintain the issues on his part joined, called in order, Doctors CHARLES S. WHITE, L. D. RICHELDERFER and JAMES TUBMAN, who testified in detail to the extent of the plaintiff's injury.

82 Thereupon the plaintiff rested his case and counsel for the defendant, the Otis Elevator Company, moved, upon the foregoing, which was all the evidence in the case, the Court to instruct the jury to return a verdict in favor of the said defendant and at the same time counsel for the defendant, the George A. Fuller Company, notified the Court of his intention to make a similar motion, based on slightly different grounds to that urged by counsel for the other defendant herein. And thereupon after argument by counsel for defendant, the Otis Elevator Company, the following colloquy occurred:

"The COURT (after argument): If you think the position of the "Otis Elevator Company is a correct one, Mr. Hayden, you should "state to the Court.

"Mr. HAYDEN: It is a question that has given us great concern. "We have not hardly known just where the responsibility was. But "as we have gone further into it, we are very much inclined to take "some decided action, or at least withdraw any objection so far as "the Otis Elevator Company is concerned, and let the Court rule "upon it.

"The COURT: Then you want the Court to rule upon it?

"Mr. HAYDEN: Yes sir.

The Court sustained the said motion, brought by counsel for the defendant, the Otis Elevator Company, and then and there ruled as follows:

"The COURT: I do not think you have presented a case against the "Otis Elevator Company here. While it is true that this man was "under the control, to some extent, of the persons to whom he had "been hired for a profit, I do not see that that makes any differ- "ence so far as this plaintiff is concerned, and the question that I "suggest to the counsel it seems to me is independent of that fact. "If a man hires a person under a contract of service to another party "as a builder, and so on, and that person undertakes to hire him out, "to sub-contract, if I may use that term in this connection, puts a "temporary authority, in other words, in the hands of a third party "under a special contract, it would seem to me to be rather an ex- "treme doctrine that the party to whom the man is hired can again "rehire that man to somebody else, whose employment might be very "much more hazardous; not applying to this particular case, but the "principle is the same; and then to hold the original master respon- "sible for something he may not have known—it not appearing in "this case that he did know it. That, in my judgment, would be a "very serious question, and I content myself by deciding the case as

"it is presented upon the theory that he was not in the actual control "of this servant, but that it was in his hands, and I therefore think "the defendant, the Otis Elevator Company, ought to be discharged "from responsibility for this accident. The verdict will therefore be "in favor of the Otis Elevator Company. Of course, you can take an "exception if you want to."

"Mr. HAYDEN: I do not think we wish any exception.

"The COURT: Very well; I guess the jury had better be
83 "directed to return a verdict in favor of the defendant, the "Otis Elevator Company."

Accordingly the jury was instructed to return a verdict in behalf of the defendant, the Otis Elevator Company, and did so return a verdict as aforesaid.

And thereupon counsel for the defendant, the George A. Fuller Company, moved, upon the foregoing, which was all the evidence in the case, the Court to instruct the jury to return a verdict in favor of the defendant, but the Court overruled said motion, to which ruling of the Court the said defendant, by its counsel, then and there duly excepted.

Thereupon, in order to prove the issues joined on its part in said case, the defendant, the George A. Fuller Company, produced FRANCIS J. FISHER as a witness in its behalf, and he testified that he was superintendent for Harry Wardman; that on the 9th day of August 1907 he was employed on the Hibbs Building, by the George A. Fuller Company, to superintend the work of finishing up and had been so engaged for about three months; that prior to that he started in as timekeeper; that his duty as such timekeeper was to keep the time of all the men employed on the building by the George A. Fuller Company and as superintendent his duty was to look after the work in general and finish up, also keeping the time in addition to his duty as superintendent; that on August 9th, 1907 the aforesaid Joseph Locke was not in the employ of the George A. Fuller Company nor had the said Locke been in the employ of the George A. Fuller Company since the 1st day of July, 1907; that the said Joseph Locke was in the employ of the defendant, the Otis Elevator Company, who was paying him, the said Locke, and that the latter was operating the said elevators on August 9th, 1907; that on said date the aforesaid elevator, which caused the accident, was being used by Robert E. Mackay Company's painters who were painting the east elevator shaft; that there were two elevators in the building, the one nearer the entrance to the building being designated by him the right hand elevator and the other, the left hand elevator; that the painters were using the one farthest from the door of the building which was the east elevator; that they had been working in the shaft of that elevator, off and on, for about a month and on August 9th, 1907 they began work in the same shaft at 7:30 in the morning; that while the painters were using the said elevator, the aforesaid operator, Joseph Locke, was under the orders of the Robert E. Mackay Company's men; that he told the aforesaid Joseph Locke that he, the said Locke, must receive his orders from Robert Minte, the foreman

for the Robert E. Mackay Company, or Minte's representative; that on this occasion when the painters of the Robert E. Mackay Company were using the said elevator or elevators for painting, no supervision in the doing of the painting work in the shaft was exercised by the George A. Fuller Company and no directions or orders relative to the doing of the painting work, as aforesaid, were given by the George A. Fuller Company and that on the date aforesaid or at any other time when the Mackay Company's painters were engaged in
84 painting from the top of the said elevator or elevators, he did not exercise any supervision over the elevator operator or the said elevator; that whenever it happened that he desired to use the elevator for any purpose, for the George A. Fuller Company, while the Mackay Company's painters were using it, he went to the said Mr. Minte, the foreman, and asked him if he could use it and he, Minte, would turn it over to him, the witness, and put his painters to doing something else, while he, the witness, was using the elevator; that he had an understanding with the said Minte that if at any time he, the witness, had any important work upstairs, for shaping up things, that he, the witness, could get the elevator; that while the Mackay Company's painters were at work on the said elevator, or using it for any purpose, he, as the superintendent of the aforesaid building, did not interfere with the operator or with the running of the said elevator; that the Mackay Company's painters started to work at half past seven on August 9, 1907 and worked about three hours before the accident occurred; that when the said foreman, Robert Minte, was not at the said building, he, the said Minte, left the signals to be given by one of his, Minte's men in the elevator shaft and the plaintiff, McCloskey, was the one who gave the signals; that he saw the plaintiff in this case at work in the said elevator shaft on three or four occasions previous to the day of the accident and had seen him on top of the cage of the said east elevator; that at the time of the accident he was not in the said building; that he knew the construction of the said east elevator and of the top of it especially and that a person could sit or ride on top of the aforesaid cross bars or stand on top of the same; that he had often ridden on top of the elevator in that position; that a person could stand on the dome of the said elevator top and hold to the cable which supported the said elevator; that a person sitting or standing on the aforesaid cross bars would be at least a foot and a half away from the counterbalance weights at the east side of the said elevator; that he rode there often; and that he did not make any arrangement with anyone of the Otis Elevator Company relative to the elevators and the operators.

On cross-examination the witness testified that the elevator operator, the said Joseph Locke, did not report to him the number of hours he worked in the elevator but that the said operator reported his time to the Otis Elevator Company; that he did not know anything about the agreement between the George A. Fuller Company and the Robert E. Mackay Company relative to the said elevators; that all he knew was that the Robert E. Mackay Company used them and that the same equipment that hoisted material for the George A. Fuller Company, was used by the Robert E. Mackay Company for

painting from the top of the elevator; and that at the time the said operator, Joseph Locke, was being used by the Robert E. Mackay Company, he exercised no control over the said operator; that when the said elevator operator was employed by the George A. Fuller Company then he had charge of him; that he did not direct the said operator to operate the elevator for anybody else; that that was done in the office; that he told the said Locke to obey the orders of
85 Minte and his painters while operating the said elevator and the order of the signals when the painters wanted to go up and come down; that the said Locke was told to observe the signals that might be given to him, the said Locke; and how the painters wanted the elevator operated and that was what he meant, and that was the only control delegated to them; that Locke was standing where he could not see when they had finished their work; that they were on top and it was therefore necessary to signal him, the said Locke by some means, either to request him to go up and to stop or in some way let him know how they wanted the elevator operated.

Thereupon the witness was asked the following questions:

Q. Did you agree to operate it for any person or company other than the Mackay people while you had it hired from the Otis Elevator Company? A. Did we agree to hire it to anybody else?

Q. Yes; did you hire it to anybody else; did you contract to operate it for anybody else save the Robert E. Mackay Company during the time you had it from the Otis Elevator Company? A. I never made any contracts at all.

Q. Well, was it used by anybody else save the Mackay Company and yourself? A. Yes sir.

Q. By whom? A. The Bosford-Dickinson Company.

Q. On the same terms that you were operating it for the Mackay people? A. I don't know. I suppose so.

Q. At a dollar an hour? A. I don't know about that. That was done in the office.

Q. But as a matter of fact, you do know that the Fuller Company did operate for some one else other than the Mackay people, and that other party was whom?

Mr. COLBERT: Your Honor, we object to that. That assumes something that is not in the case. There is no evidence that they operated it for anybody.

The COURT: Oh, yes; he said they did operate it for Bosford-Dickinson, but he did not know the terms.

Mr. COLBERT: But the question is if the Fuller Company were operating for Bosford, Dickinson & Company, and therefore we object to assuming something that does not exist.

The COURT: I may have misunderstood the other answer. I think he said that they were operating it for the Mackay Company.

Mr. COLBERT: He said they were using it. Let the stenographer read what was said.

(The stenographer read as follows:)

"Q. Well, was it used by anybody else save the Mackay Company and yourselves? A. Yes sir.

"Q. By whom? A. The Bosford-Dickinson Company.

"Q. On the same terms that you were operating it for the Mackay people? A. I don't know, I suppose so.

"Q. At a dollar an hour? A. I don't know about that. That was done in the office.

86 "Q. But as a matter of fact, you do know that the Fuller Company did operate for some one else other than the Mackay people, and that other party was whom?

Mr. COLBERT: I object to the pending question.

The COURT: Make it read: "Do you know."

(The question was repeated as follows:)

"Q. As a matter of fact do you know that the Fuller Company did operate it for some one else other than the Mackay people; and, if so, who was that other party." A. Yes sir, I know that.

By Mr. *DAYDEN*:

Q. What other people or persons or company was it being operated for by the Fuller people, other than its own company and the Mackay Company? A. I think the Bosford-Dickinson Company and the Mackay Company were the only ones.

Q. What did the Bosford-Dickinson Company do in the construction of that building; who were they? A. They had the woodwork. They supplied the doors and trimmings, and so forth.

Q. Can you think of any one else; were there other contractors there? A. I think they were the only two in the building when the elevator was in running order.

And the witness further testified:

That he never made any contracts; that he had ridden up on top of the said elevator, by standing on the aforesaid cross bars and holding to the cable and while in such position had carried up in his arms six pieces of flooring; that he could have stood in the same position, holding on to the cable with one hand and could have held in the other hand the stippling brush and pot of paint, testified by the plaintiff, to have been carried up by him, the plaintiff. Immediately after the accident he started to get reports about it.

And thereupon the following questions were asked:

Q. If you had a pot of paint in one hand and a stippling brush in the other, kindly inform me how you would hold on to the cable? A. I think I would hold the stippling brush and the pot of paint in one hand.

Q. How large is the stippling brush? A. I don't know what size brush he was using.

Q. Is *it* a large brush, weighing 10 pounds, is it not? A. No sir.

Q. Is *it* a big brush, is it not? A. The one he had was for touching up, and I don't think it was a large brush.

Q. Would you have considered it much of a feat to have gone up there with those incumbrances? A. No.

On redirect examination the following question was propounded to the witness:

"Q. On the 9th of August, 1907, when you had turned that elevator and the operator over to the Mackay Company, state just what you said to Locke?"

To the answering of which question counsel for the plain-
87 tiff objected, and the Court sustained the objection, to which ruling of the Court the counsel for the defendant, the George A. Fuller Company, duly excepted.

And on further redirect examination the witness testified that on the morning of the 9th of August, 1907, he told the said Locke, to act according to the way Mr. Minte directed him to and that he, the said Minte, was to have charge of him and give him, the said Locke, his instructions about the running of the elevator; that on that occasion he did not say anything to the said Locke regarding signals; that while the Robert E. Mackay Company was using the said elevator it had control of the operator, and was to give the signals, and the understanding that he, the witness, had with Mr. Minte, was that he, the said Minte, was to have the exclusive use of the said elevator; that on the morning of August 9, 1907, nothing was said between him and the said Joseph Locke, about signals; that he, the witness, knew nothing about any arrangement between the George A. Fuller Company and the Botsford-Dickinson Company regarding the use of the elevator and the operator prior to the day of the accident and simply knew the fact that the Botsford-Dickinson Company used the said elevator; and the witness further testified that he did not know whether the elevator equipment was turned over to the Botsford-Dickinson Company or whether the George A. Fuller Company was operating it for the Botsford-Dickinson Company.

The examination of said witness being concluded, PHILLIP F. GORMLEY was produced as a witness in behalf of the defendant, the George A. Fuller Company and testified that he was a contractor in business for himself with the Gormley-Poynton Company; that on August 9, 1907, he was employed by the George A. Fuller Company as its general superintendent but that at the time of testifying in this cause he was not employed by the George A. Fuller Company in any capacity; that he did not make any arrangement with the Otis Elevator Company relative to the use of elevators in the Hibbs Building and did not know anything about the arrangement that existed between the two said Companies on August 9, 1907; that as to the said elevators on the said date there was no arrangement but there had been some arrangement relative to a temporary hoist or elevator when the George A. Fuller Company was hoisting building material and at that time the latter Company had an engineer to operate the elevator while the Otis Elevator Company had a man there looking after it to see that he controlled the appliances properly and the said Otis Elevator Company's man looked after the ropes, greased the machinery and saw that everything connected with the elevator was properly cared for; that he did not know

of any arrangement between the George A. Fuller Company and the Robert E. Mackay Company as to the use of the aforesaid elevator at any time; that the elevator used under the arrangement with the Otis Elevator Company as a temporary hoist, at the time referred to by him, was a mere platform running in the regular passenger elevator shafts; that as general superintendent for the George A. Fuller Company, he supervised the construction
88 of the said Hibbs Building and knew that the Robert E. Mackay Company used the passenger elevators for hoisting paints to the fifth floor of the said building where they stored their materials in a room and used the elevators for other work but that he did not know for what purpose the said painters were using the elevators on August 9, 1907, and it was not until after the occurrence of the accident to the plaintiff that he learned what such use was; the witness was thereupon asked the following questions:

"Q. Who was the operator in charge of those elevators? A. Locke.

"Q. In whose employ was he? A. In the employ of the Otis Elevator Company.

"Q. Who paid him? A. The Otis Elevator Company.

"Q. What authority or control did you or the George A. Fuller Company have over Mr. Locke? A. Not any.

"Q. What control or authority did you have over him on the 9th day of August, 1907? A. Not any.

"Q. Had you any right to discharge Mr. Locke? A. No sir.

"Q. Did you have any right under whatever arrangement existed between the George A. Fuller Company and the Otis Elevator Company to substitute some one else on that elevator for Mr. Locke? A. No sir.

And the witness further testified: that as general superintendent of the George A. Fuller Company he had charge of all of their work in this city, including the said Hibbs Building and during the construction of the said building looked over the construction thereof five or six times a day from the time the building was started up to the time of its completion; and the witness further testified that he could not remember the exact date when the said building was turned over to the owner, under the George A. Fuller Company's contract.

No cross examination of the witness.

The examination of said witness being concluded, JAMES BAIRD was produced as a witness in behalf of the defendant, the George A. Fuller Company, and testified that he was the manager of the George A. Fuller Company, the defendant, and was employed as such on August 9, 1907; that the work of constructing the aforesaid Hibbs Building came under his control and he knew the contract entered into between Mr. Hibbs and the George A. Fuller Company, for the erection of the aforesaid building.

Thereupon, in order to prove the issues joined on its part in said case, the defendant, the George A. Fuller Company, introduced in evidence the original contract between the George A. Fuller Company and William B. Hibbs, dated September 22nd, 1906, for the construction of the aforesaid building.

The aforesaid contract was in writing and duly executed on the date aforesaid, by the George A. Fuller Company and the said William B. Hibbs and the terms thereof were in substance
89 as follows: That the George A. Fuller Company should provide all the materials and perform all the work for the erection and completion of a ten story and basement, steel skeleton, fire-proof office building on certain designated lots and parts of lots in Square 222, according to ground plan of the city of Washington, D. C., all as shown on the drawings and described in the specifications prepared by the Architects, which said specifications did not include the construction or installation of any of the elevators or elevator machinery for said building. The said William B. Hibbs by the said contract required the said George A. Fuller Company to complete the said building within ten months from the date of the aforesaid agreement, and agreed to give the said contractor possession of the building site not later than the aforesaid date of the contract. The sum paid by the terms of the said contract, for the erection of the said building, was the actual cost, to the George A. Fuller Company, of the work and materials required for the construction of the said building, plus eight (8) per cent thereof for the supervision of the construction by the said George A. Fuller Company, but it was further agreed that if the total cost of said work and materials and said eight (8) per cent additional should exceed a certain stipulated sum then the said George A. Fuller Company was to receive only the stipulated sum in full payment for all work, materials, and its supervision, subject to certain additions and deductions as provided for by the terms of the said contract. The George A. Fuller Company was by said contract required to submit to the owner of the said building, vouchers for all expenditures including ten (10) per cent of the value of all large tools, machinery and derricks used in the construction of the said building, to compensate for wear and tear, while all small tools and the expense of keeping them in repair, less ten (10) per cent for wear and tear, was charged as part of the cost of said building but this provision did not apply to any property of subcontractors of the George A. Fuller Company.

The said William B. Hibbs was to have access to the books of account and time sheets, in connection with the said building, for the purpose of verifying the account.

The George A. Fuller Company was required to deliver to the Architects, on or about the tenth of each month, a statement of all disbursements made for work and materials incorporated into the said building, together with vouchers for same, for audit. If found to be correct, the architects would, within five days, issue to the George A. Fuller Company a certificate for the sum of said vouchers

and the owner was required to pay such certificate within seven days after receiving same.

It was further stipulated and understood that the plans and specifications excluded certain portions of the work which portions of the work were to be performed by the owner at proper time so as not to delay the general progress of the work.

No charge was to be made by the contractor, as part of the cost, for the services of any officers of the contractor, nor for
90 clerical services in any of its offices other than the temporary office on the building.

The deductions thereinbefore referred to were to be allowances for changes, while the additions so referred to were to be for extras.

And thereupon the witness further testified as follows:

Q. It has been testified in this case that there was some arrangement made between you and the Robert E. Mackay Company relative to the use of the elevators in that building for some purpose. Do you recall any conversation with Mr. Minte on that subject? A. I recall Mr. Minte coming up to see me about it, to arrange for the elevators.

Q. Please state what the conversation was? A. It was not much at length. As I recall, he called at my office and said he wanted to have the use of the elevators at times, and wanted to know how he could arrange it. I simply told him he could have the use of them under the customary arrangement; that whenever he wanted to use the elevators, if the Otis Elevator Company or ourselves were not using them, he could have the use of them for any purpose he might desire, and we would charge him the customary rate.

Q. What was that rate? A. I think we had rented the elevators to Mackay before at one dollar an hour, the customary rate.

Q. Was anything said between you and Mr. Minte on that occasion with relation to doing the work of hoisting the elevators up and down? A. Nothing whatever.

Q. What was the talk directed to? A. He simply came to me and asked for the use of the elevators, and I told him he could have it.

Q. Did that also include the operator? A. It included everything.

Q. That you were to lend the elevator and the operator to the Mackay Company? A. Yes; he had everything that went with the elevator.

Q. What were the charges made for the elevator, and to whom were they made, for lending that elevator and the operator? To whom were the charges made? A. To the Robert E. Mackay Company.

Q. What was the charge? A. One dollar per hour for all the time that he had the elevator in his use.

That the George A. Fuller Company did not know, at the time of the said arrangement with the foreman of the Robert E. Mackay Company what the Otis Elevator Company would charge for use of the elevator by the George A. Fuller Company and it was not until he received the Otis Company's bill or invoice that he had any idea thereof; that the Otis Elevator Company charged Three Dollars a

day straight time and also included charges for repairs, grease, fuses and such things, as shown by the aforesaid invoice; thereupon the witness was asked the following question:

"Q. What became of the credit from the Mackay Company to the " Fuller Company of a Dollar per hour? A. It was credited to Mr. " Hibbs."

To the answering of which counsel for the plaintiff objected.

Counsel for the defendant, the George A. Fuller Company,
91 argued that the question was asked for the purpose of showing what interest or control the George A. Fuller Company had in or about the said elevator or the operator at the time the Robert E. Mackay Company was using it; that it had been shown that the Otis Elevator Company paid the operator and counsel proposed to show that whatever was received from the Robert E. Mackay Company was credited to Mr. Hibbs and that the Fuller Company had no interest whatever in the matter. But the Court sustained the objection and thereupon counsel for the defendant, the George A. Fuller Company then and there excepted to the ruling of the Court.

And thereupon the witness further testified that he did not recall any arrangement with the Otis Elevator Company for the use of that car; that it is customary for the builder to use the car for the benefit of all desiring it; that he did not think there was any special arrangement made and that he was the only one to make any such arrangement; that there was no other conversation between him and the said Minte relative to the use of the said elevators by the Robert E. Mackay Company; that he had often seen the construction of the elevator which caused the accident and knew about the arrangement of the cross-bars on top of the said elevator and that a person could sit on the said cross-bars very easily; that if a person sat close to the suspending cable, such person would be about two and a half or three feet from the counter-balance weights of said elevators and there were several places where one could sit on the said cross-bars and be far removed from the weights; that a person could stand on top of the dome and hold to the suspending cables connected with the said cross-bars; that he told the said Minte, when they arranged for the Robert E. Mackay Company to have the elevators, that while the George A. Fuller Company was charging the Robert E. Mackay Company for the said elevator, the latter Company was to have exclusive use of it and that he would not interfere with the Mackay Company's use of it without making his request for it in due time for Minte to dispose of his, Minte's men to other advantages; if the use of it at one o'clock in the afternoon was desired by the George A. Fuller Company notice thereof would be given to the said Minte sometime during the forenoon, but if the Otis Elevator Company wanted to use the elevator, it would have first call on the same at all times.

Upon cross examination the witness testified as follows:

"Q. Now, they borrowed that elevator, its service and its operator, " for a dollar an hour? A. The arrangement was just as I tried to " outline it in my testimony.

"Q. Answer my question. Is that so? They were paying a dol-
" lar an hour? A. They paid a dollar an hour.
"Q. And they were borrowing it, and you were lending it? A.
" I don't know whether you could say they were borrowing it. They
" were renting it. They were paying for it.

The examination of said witness being concluded, JOSEPH P. LOCKE, was produced as a witness in behalf of the defendant, the George A. Fuller Company, and testified that he was the op-
92 erator who was running the elevator in question on August 9, 1907 and he was on said date employed by the defendant, the Otis Elevator Company and had been in their employ continuously for about five months prior to said date; that his said employment with the Otis Elevator Company continued for about four months after the said date; that at the time of testifying in this cause, he was employed at the Munsey Building by the Washington Times; that prior to the date of the accident the painters had been painting the elevator shafts and had continued that operation a number of times going up and down in the shafts; that on the morning of August 9th, at the time of beginning work, that was 7:30 A. M., he was told that the painters would use the elevators that day, as they had done before that date, and he began his operations as he had done previously by throwing in the switch and getting ready; that about twenty minutes after 7:30 A. M., the painters started to work, painting the east shaft, and they continued that operation a number of times, going up and down in the shaft a number of times; that finally the elevator, with the painters, including the plaintiff, on top thereof, reached the bottom of the shaft and he presumed they were painting and were ready to go up again; that he had, during all of these operations, in the painting of the said east shaft on the day aforesaid, been receiving his orders from the plaintiff, who was on top of the elevator in question, working with the other painter; that when the elevator was at the bottom of the shaft as aforesaid, he called to the plaintiff who said to him "We are ready to go up." and he asked the plaintiff if he was ready and the plaintiff replied "Yes I am."; that he then said to the plaintiff "Look out for the weights.", and the plaintiff replied "All right."; that before moving the car, he called to the painters a second time saying "Mac, be careful of the weights." and the said plaintiff replied, "I am all right. Go ahead." which he then did; that he then started the elevator on the first speed, which was its slowest speed, and proceeded up, the trip being continued until the elevator came to a stand still, caused by the weights striking the plaintiff's foot; that he then jumped out of the car, went into the basement where the machinery was installed, and operating the elevator from there lowered the same, which raised the counterbalance weights and released the plaintiff's heel; that the elevator was, by an automatic device known as the slack cable devise, stopped immediately upon the weights coming in contact with the plaintiff's heel; that the counterbalance weights comprised an upper and a lower set with an open space of eight inches there-between and it was in this space and about midway of the weights, that the plain-

tiff's heel was caught, as he observed before he released it; that neither the plaintiff nor the other painter, Mr. Renner, ordered him to stop at the second floor; that on the day aforesaid, the plaintiff had been giving all orders or directions to him and that if he had been directed by the plaintiff to stop at the second floor, there was no reason why he could not have done so; that when he jumped out of the elevator to see what had stopped it, and observed the accident
93 to the plaintiff, the latter did not then make any complaint about his operation of the elevator, neither did the plaintiff say anything about the elevator not stopping at the second floor; that he observed McCloskey's position on top of the elevator while his heel was caught by the weight and saw that his right foot was on the flat rim at right angles to the weight and that his body was leaning towards the center of the top with his hands resting on the cross bars; that always while the said elevator was used by the Robert E. Mackay Company's painters he operated it on the first speed; that between half past seven a. m. and the time that the accident occurred on August 9, 1907, he received all of his orders from the plaintiff and that the said orders included the moving of the elevator up and down as a movable stage and everything else pertaining to the painting of the said elevator shaft; that in the doing of that work for the Robert E. Mackay Company neither the said Mr. Fisher, superintendent of the building for the George A. Fuller Company, nor its general superintendent, the aforesaid Mr. Gormley, attempted to interfere with him in any manner; that in moving the said elevator up and down in its shaft, he would stop it at different places to permit the painters to touch up spots, upon order from them; that on this last mentioned trip going up, just before the accident, he was not directed to stop at any floor; and the witness further testified that he never told the plaintiff that he was paid and employed by the George A. Fuller Company; and the witness further testified that on the last trip after placing the lever at the first speed notch, he held it there with his hand all the time and there was never any pause in the movement of the elevator until it was stopped by McCloskey's foot.

Upon cross examination the witness testified that during the time that the plaintiff was at work on the said elevator, witness obeyed the plaintiff's signals as to starting and stopping and the plaintiff exercised that control over him; that on the morning of the accident, if he remembered right, he began at the bottom of the shaft, with the painters, and worked with them up and down in the said shaft a number of times, stopping as they indicated; that on the last trip of the elevator, prior to the accident, the painters did not order him to stop at any particular place and he understood that they were going to repeat the operation, as they had done before, which was going over the shaft and touching up the spots; that he was authorized to obey any orders given to him, by the Robert E. Mackay Company's painter foreman, who in this instance was the plaintiff; that he did not take orders from the plaintiff, except those relating to the running of the elevator; that at the time of the accident there were two passengers in the said elevator but that they did not say which

floor they wished to go to, that the plaintiff, Mr. McCloskey, told him that he could carry the said passengers in the elevator after he first asked if he should do so; that this permission was given to him at the first floor just before the elevator was started up on the last trip as aforesaid; that he told the plaintiff then that there was a couple who wanted to go up as we went and he said to the plaintiff, "Can they go?" to which the plaintiff replied, "Yes."

94 On redirect examination the witness testified that McCloskey, while the aforesaid conversation was carried on, was standing in the same place as when said McCloskey met with the accident, because he the witness was standing in the door—the door sill and he could see McCloskey while talking to him.

On recross-examination the witness testified that he did not know where McCloskey was standing when struck by the first weight.

On further re-direct the witness testified that he knew where the plaintiff was standing when his foot was caught, because he found it fastened when he went up there, but he could not say that McCloskey had not changed his position after the aforesaid conversation, and before his foot was caught by the weights.

The examination of said witness being concluded, the aforesaid Ramsey W. Scott was produced as a witness in behalf of the defendant, the George A. Fuller Company and testified that he was acquainted with the construction of the aforesaid elevator in the Hibbs Building and that a man could stand or sit upon the aforesaid cross-bars on top of the aforesaid elevator and keep out of contact with the aforesaid counterbalance weights and that a person could, in such positions hold to the cables from which the elevator was suspended; that he had stood upon the aforesaid cross-bars on one occasion when he inspected the rails; that it would be nearly impossible for a person, standing on the aforesaid cross-bars and holding on to the aforesaid cables, to come near enough to the aforesaid counterbalance weights to permit such person's feet to be struck by the said weights; that a person could stand on top of the dome of said elevator and hold to the said cable and ride there without coming in proximity to the said weights; that a person could stand on the other set of cross-bars, which were arranged diagonally of the first mentioned set of cross-bars, without being in proximity to the weights; that a person could also stand on any of the other three sides of the said elevator, on the flat rim of the top of said elevator, where there were no weights at all adjacent, and thereby could have avoided contact with the said weights.

On cross-examination the witness testified that it would not have been safe to ride on the top of the car, in approaching the top floor unless the elevator operator was cautioned to slow down and stop it before the grating at the top of the shaft was reached; that if such caution was given to the operator it was comparatively safe to stand or to work, on the aforesaid cross bars; and the witness testified that in riding on top of the elevator and on the aforesaid cross-bars or the other diagonal set of cross-bars, termed by him the cross-head, with

a stippling brush and a pot of paint, a person should have one hand disengaged and with the other hand hold to the aforesaid cables.

95 The examination of said witness being concluded, Dr. FRANK LEECH was produced as a witness in behalf of the defendant, the George A. Fuller Company, and testified that he had examined the plaintiff and found that the tendon Achillis had been injured about four and half inches above the sole of the heel; that the fracture of the heel bone had perfectly united and that there was no evidence of any other injury and there was no evidence of the fracture in the heel bone; that from the character of the scar on the said tendon the plaintiff's foot must necessarily have been at a right angle to the weights when the heel was caught thereby; and the witness further testified that it would be impossible for a man standing with his right foot in the position, claimed by the plaintiff, to receive the injury which the plaintiff received and that the weights could not have produced such an injury if they had hit the side of the plaintiff's foot.

Upon cross examination the witness testified that the plaintiff must have attempted to turn around in order to get his foot caught in the manner described by the witness Joseph P. Locke. He did not know that he was thrown around; at any rate his foot got around that way.

The examination of said witness being concluded, Dr. JOHN R. WELLINGTON was produced as a witness in behalf of the defendant the George A. Fuller Company, and testified that he was a physician and surgeon and that his practice was confined to surgery altogether and that he was the surgeon for the Casualty Hospital and for the Children's Hospital and one of the surgeons for the George Washington Hospital, and that he was also clinical professor of surgery at George Washington Hospital; that from the character of the injury received by the plaintiff and the location and character of the scar produced by the wound as described in an hypothetical question propounded to him that it would have been absolutely necessary for the weight to have hit the plaintiff's heel perfectly square and at right angles to the foot in order to have produced such an injury to the Tendo Achillis and that if the said tendon had been hit from the side, he did not believe it would have been possible to have crushed the tendon, without crushing the whole foot, because the said tendon is very strong, very thick and powerful.

Upon cross examination the witness testified that if the plaintiff had been standing in the position testified to by him, the plaintiff, and had been thrown off his balance, still his heel must have been at right angles to the weight, when struck, in order to have produced the injury described; and that his foot, when it was finally caught, must have been at a right angle to the said weight. I don't know how he got there.

And thereupon, the defendant, the George A. Fuller Company, rested its case.

96 And thereupon the plaintiff was recalled as a witness, in his own behalf, in rebuttal, and he testified that on the morning he was injured he did not have any conversation with the elevator operator, agreeing that the operator should carry a passenger or passengers and that nothing was said in that respect between the witness Renner and the said operator, or between him and the operator.

There was no cross examination of the witness.

The examination of said witness being concluded, the plaintiff recalled as a witness in rebuttal, NEWTON D. RENNER, who testified that he did not remember anybody telling the elevator operator that he could carry passengers on the trip which resulted in the injury to the plaintiff and that he did not remember any such conversation.

And thereupon the plaintiff rested his case.

And thereupon, u pon all the evidence hereinbefore set out, which is hereby referred to and made a part hereof, and which was all the evidence in the case, the plaintiff, by *its* counsel, prayed the Court to instruct the jury as follows:

1. The jury are instructed as matter of law that upon all the evidence in the case, the elevator operator, Lock, at the time of the happening of the injury to the plaintiff, must be considered to have been the servant of the defendant, the George A. Fuller Company.

(Granted & Exc.)

2. The jury are instructed that if they find from the evidence that the plaintiff, Wilson A. McCloskey, while being carried on the top of the elevator in the Hibbs Building, in connection with the performance of his duties in painting the shaft of said elevator, as an employee of the Robert E. Mackay Company, was injured through the negligence of the elevator operator in neglecting to obey [declaration]*
his signals in the manner described in the ^ *plaintiff's evidence* and that the happening of said injury was not contributed to by negligence or want of proper care on the part of the plaintiff, their verdict should be for the plaintiff.

(Amended and granted.)

(Exception.)

3. If the jury find for the plaintiff, they are to consider, in estimating the damages, the injuries to the plaintiff Wilson A. McCloskey and the damages resulting therefrom to him.

They are to take into consideration the suffering including bodily pain, in consequence of such injuries, and also the mental suffering and pain attendant upon and the natural incident of such bodily suffering, the character and extent of his physical disabilities, and whether the injury is permanent or otherwise.

(Conceded.)

[* Word enclosed in brackets erased in copy.]

97 The court granted the first prayer and also the second prayer as amended. The third prayer offered by counsel for the plaintiff was conceded. To the granting of the first and second prayers, so offered by counsel for the plaintiff, by the Court, counsel for the defendant, the George A. Fuller Company, then and there separately and severally excepted.

And the counsel for the defendant, the George A. Fuller Company prayed the court to instruct the jury as follows:

At Law. No. 50782.

McCLOSKEY
v.
GEORGE A. FULLER CO. et al.

1. The Jury are instructed that under the pleadings and all the evidence, their verdict should be for the defendant, the George A. Fuller Company.

(Refused and Exc.)

2. The Jury are instructed that if they find from all the evidence that the accident to the plaintiff complained of was occasioned in any degree by his own carelessness, the verdict should be for the defendant, the George A. Fuller Company, regardless of whether the elevator operator was negligent or not, or whether he was the servant of the Fuller Company or not.

(Conceded.)

3. If the Jury find from all the evidence that the accident to the plaintiff was occasioned wholly or in part by reason of the fact that he had placed himself in an exposed and dangerous position on *the ledge around the top of the elevator car, with reference to obeying the signals to stop at the second floor, if you find such signals were given* when he might readily have placed himself in a safe and secure position, the verdict should be for the defendant the George A. Fuller Company, regardless of any supposed negligence on the part of the elevator operator and regardless of whether the operator was a servant of the Fuller Company or not.

(Conceded as Amended.)

(Refused as asked & Exc.)

(The parts underscored were added by way of amendment.)

4. If the jury find from all the evidence that at the time of the accident to the plaintiff complained of, the elevator operator whose alleged negligence caused the injury to the plaintiff, was employed and paid by the Otis Elevator Company, which Company hired or loaned the elevator with its equipment and power to run it, together with the operator himself, to the Fuller Company for that Company's purposes, and if they further find that the Fuller Company in turn entered into a contract with the Mackay Company by which the latter agreed to do all the painting in the Hibbs Building, including the elevator shaft, and to supply all the labor and materials necessary therefor, and that the Fuller Company agreed with the

98 Mackay Company to turn over to the latter the elevator with its power and equipment and the operator to run it with the

understanding that while the elevator and the operator were being used for the purposes of the Mackay Company's work, said Mackay Company should have the exclusive control and direction of the movements of said elevator and the operator himself, and that while engaged in doing the Mackay Company's work, the operator negligently caused the injury complained of, then said operator for the time being was the servant of the Mackay Company and not of the Fuller Company, and the verdict should be for the defendant the Fuller Company.

(Rejected & Exc.)

5. If the Jury find from all the evidence that the Mackey Company had the contract for doing the painting work in the Hibbs Building under an agreement with the Fuller Company, including the painting of the elevator shaft, which work required the construction of a stationary or swinging scaffold, or the use of the elevator, and if the jury further find that the Mackay Company for reasons satisfactory to it preferred to procure and did procure from the Fuller Company the use of the elevator and an operator to run it, and that while engaged in doing the Mackay Company's work, the operator was placed under the exclusive control of the Mackay Company, then said operator became for the time being the servant of the Mackay Company, and the verdict should be for the defendant.

(Rejected & Exc.)

6. The jury are instructed that the fact that the plaintiff was injured, no matter how seriously *in itself* does not entitle him to recover in this action, but before a verdict in any amount can be rendered in his favor, the jury must find that the elevator operator was at the time of the accident guilty of some negligence, and did not act as a reasonably prudent man should have acted under all the circumstances, [and that as defined in previous instructions said operator was the servant of the Fuller Company while performing the acts which occasioned the accident.]*

(Refused as asked & Exc.)

(Conceded as Modified.)

(The language struck through, appeared in the prayer as originally presented. The part added by way of amendment is underlined.)

7. The Jury are instructed that in considering the question as to whose servant Locke, the elevator operator, was at the time of the accident, they may take into account, along with all the other evidence in the case, the fact that the Fuller Company did not employ and did not pay Locke for his services, and had no power to discharge him, and also the fact that at the time of the accident, the Otis Elevator Company had not turned the elevator over to the owner of the building.

(Rejected & Exc.)

99 8. The Jury are instructed that there can be no recovery in this case on the ground of the total disability of the plain-

[* Words enclosed in brackets erased in copy.]

tiff to perform manual labor, if they are satisfied from all the evidence that the plaintiff is able to perform manual labor to some extent, and in this respect the recovery must be limited to the diminution of the plaintiff's ability to do manual work, and such other elements of damage as the plaintiff may be entitled to recover.

(Conceded.)

9. The Jury are instructed that if upon consideration of all the evidence and the instructions given by the Court, the jury should come to the conclusion that the plaintiff is entitled to a verdict, then in estimating the amount of the damages they should not be guided or influenced in the slightest degree by the fact that the plaintiff is an individual who has been injured, and that the defendant is a corporation financially able to respond to a verdict that may be rendered against it, but they should in all respects treat the defendant, the Fuller Company, precisely as if it were an individual, without being influenced by any prejudice against the defendant corporation or by any feeling of sympathy of the plaintiff on account of his injuries.

(Conceded.)

The second, eighth and ninth prayers, so offered by said counsel for the defendant, the George A. Fuller Company, were conceded and the Court granted the said prayers, but the Court refused to grant the first, third, fourth, fifth, sixth and seventh prayers so offered by said counsel for the said defendant, to which refusal of the Court to grant each of said prayers specified, counsel for the said defendant, then and there separately and severally excepted. The Court granted the said defendant's third and sixth prayers as modified or amended and conceded.

And thereupon the Court instructed the jury as follows:

Gentlemen of the Jury, in this case the plaintiff alleges that he has been injured, and that the injury was occasioned by the defendant in the case, as they originally were, including the defendant, the Otis Elevator Company. Now, it is not necessary for you to dwell upon the question of the Otis Elevator Company at all, because the Court has decided that the Otis Elevator Company was not responsible for the injury, and your verdict was rendered for that Company under the instructions of the Court. So the only question before you is as to whether or not the injury complained of in this declaration was occasioned by the defendant company, that is to say, the Fuller Company. That is the question before you. The Otis Elevator Company is not here, and you have nothing to do with it.

Now, there is another question that has devoloped, according to the Court's view, and that is the question as to the status of the witness Locke. Was he an employee or servant of the Fuller Company or of the Mackay Company? If he was a servant of the Mackay Company, then this plaintiff can not recover in this case. So it becomes necessary to decide the question as to whether or not he was the servant of the Fuller Company.

100 Now, the Court has decided—and its decision is final, so far as you are concerned, there being the opportunity and the

right of the parties to correct the Court's findings by a higher Court, if this Court should be in error on that subject—and I have granted a prayer that says to you that so far as this case is concerned now, all the testimony in the case on both sides seeming to agree on the given point, that the witness Locke was the servant of the Fuller Company. Therefore that question of law has been eliminated, and you have no concern with it. It therefore follows that the only question with which you are concerned is the one question, has the defendant company, that is, the Fuller Company, been guilty of negligence, and was this negligence the cause of the plaintiff's injury, and, if it was, what is the estimate which you place by way of damages upon that injury?

Keeping in mind always that the law says no matter how negligent the defendant may be, no matter how negligent you may find the defendant, the Fuller Company, to have been in this case, still if you find the plaintiff was negligent in any degree that contributed to the injuries, then if he was responsible entirely for his own injury, or if he was in part responsible for his own injuries, the Court does not undertake to measure the difference of the amount of negligence, but it simply says that even if the defendant was negligent and the plaintiff contributed in some degree to his injury by his own negligence, he can not recover.

That, generally speaking, is the law of this case and of all cases of this character.

Unfortunately, something has been said in this case in the argument, brought about by the heat of argument, with which you have no concern. Very often counsel say some things that they ought not to say. This is very frequently not intentional, but they are carried away by their case. So in this case counsel for the plaintiff has undertaken to remark upon the position of the defendant in this case as a corporation, and so on.

Now, you have nothing to do with that. You have been sworn in this case to try the question of the right of recovery or not of this plaintiff, purely upon the evidence of the case. You are sworn to try it according to the law and the evidence, and you are utterly unconcerned by reason of the personality of the parties in this case. It makes no difference to you whether the plaintiff in the case is a poor man or a rich man. That is not your concern. You only know him as the plaintiff, and whether he be rich or poor is no concern of yours. Likewise as to the defendant there is nothing in this case to indicate that the defendant is rich or poor, and it does not make any difference. You have no concern with that. You treat the plaintiff as A. and you treat the defendant as B. You stand absolutely indifferent as to either of them. The only question you have to decide is, is the plaintiff entitled to recover under the evidence or not, irrespective of the plaintiff's position or of the defendant's position.

So, gentlemen, you see, the verdict of the jury is, in itself, a serious matter. You are trying the issue between men, and are not
101 concerned with their status one way or the other. The whole hope of our courts is that the juries shall do justice be-

tween man and man without any respect whatever to the personality of the parties; and I am sure you will do it, as I am glad to say most juries do in this jurisdiction.

Then what is the complaint? The plaintiff charges that he has been injured, as I have already said, by the negligence of the defendant company, through its servant or employee, Locke.

In every case that comes into our courts, the plaintiff has a given duty, and that is that when he charges negligence he must prove negligence; so that the burden of proof in this case is upon the plaintiff to show, by the fair weight of testimony, that Locke, and therefore the defendant company, was guilty of negligence. So when you go to weigh the testimony in this case, you must remember that the burden is upon the plaintiff to establish the negligence of the defendant company; and you understand if you establish Locke's negligence, you establish the negligence of the defendant company. I only say that to keep your minds clear, when I say the negligence of the defendant.

The burden, therefore, is upon the plaintiff in this cause to show, by the fair weight of testimony, that the defendant company was negligent, and that he was injured by reason of that negligence. When I say by the preponderance of evidence, or by the fair weight of evidence, it simply means that when you go to consider the question as to which side has offered the greater weight of evidence, you simply measure it and weigh it, and if from all the evidence you find that the plaintiff's evidence of this negligence weighs more, to your minds, than the testimony of the defendant, then the plaintiff is entitled to recover. If the evidence of the defendant weighs more than the testimony of the plaintiff, then of course you would have to find for the defendant; but suppose that they both weigh the same and you could not tell which side offered the greater weight of evidence. Now, the plaintiff must offer the preponderance of evidence. Its testimony must weigh more than the testimony of the defendant. Consequently, if it weighs just the same, then your verdict would have to be for the defendant, because the plaintiff's testimony must weigh more.

So, on the other hand, if the question of contributory negligence comes up, that is a defense, and then the defendant, if it sets up contributory negligence, must prove in the same way, by the fair weight of testimony, that the plaintiff contributed to his own injury by his own negligence. If he contributed in any degree to the accident then the plaintiff can not recover, and your verdict would have to be for the defendant.

You therefore see what your plain duty is. It is to carefully weigh the evidence in the cause, and discover whether the plaintiff has proven his case by the fair weight of evidence. After you have settled that question, then you have to go a step further.

I should say, first, before I come to that phase of it, that in
102 considering this question of the negligence, it is your duty to consider the position of the plaintiff, as to whether or not, considering the position where he stood on that car, in reference to the fact that he was going to the second story only, if you believe

from the evidence that that is where he had been ordered to go, whether he occupied such a position as would be reasonably safe under all the circumstances of the case, taking into consideration the fact, if you believe it to be the fact, that he was to be taken to the second story of the building.

All of these questions, therefore, enter into the case. You have no right, under the law, to take into consideration the fact that an accident happened. The happening of an accident does not justify a verdict at your hands, because that is not the question. The question is, did the accident happen by reason of the negligence of the defendant. So the happening of the accident amounts to nothing, unless you connect it with the fact that it was through the negligence of the defendant company that the accident happened.

So you see all of these things work together. You must draw no conclusion from the mere fact of the happening of the accident itself, but you must draw your conclusions that the accident happened by reason of the negligence of the defendant before you can find for the plaintiff.

In that connection I do not know whether it is necessary to read the prayers or not.

Mr. COLBERT: I think not, sir.

The COURT: You are therefore instructed, as a general proposition—and I have embodied in what I have said to you nearly all the prayers, or at least the principles involved in the prayers—that if you find from the evidence in this cause that the plaintiff was injured by reason of the negligence of the defendant company, and if his own negligence did not contribute to any part of it, then the plaintiff in this case is entitled to recover, and your verdict would be for the plaintiff.

On the other hand, if you find that it was not caused by the negligence of the defendant company, or was caused by the negligence of the defendant company and the plaintiff together, then the defendant is entitled to a verdict.

If you find for the defendant, that is the end of the case, and you have to go no further.

If, on the other hand, you find for the plaintiff, then you must go a step further, and you have then to consider what damages he is entitled to by reason of the negligence of the defendant company.

So in taking that into consideration, if you find for the plaintiff, as I have said, you are to take into consideration the suffering, including bodily pain in consequence of such injuries, and also the mental suffering and pain attendant upon and the natural incident of such bodily suffering, the character and extent of his physical disabilities, and whether the injury is permanent or otherwise.

You are entitled to take into consideration all these
103 things—bodily suffering, pain, whether that injury is permanent or not. All of those things are matters which you are entitled to take into consideration in estimating the damages incident to the negligence, and the injury caused by it.

Mr. COLBERT: Will your Honor read our 8th prayer in that connection, which your Honor has granted, I think?

The COURT: Yes.

"The jury are instructed that there can be no recovery in this case on the ground of the total disability of the plaintiff to perform manual labor, if they are satisfied from all the evidence that the plaintiff is able to perform manual labor to some extent, and in this respect the recovery must be limited to the diminution of the plaintiff's ability to do manual work, and such other elements of damage as the plaintiff may be entitled to recover."

In other words, reading the two prayers, if the jury finds for the plaintiff, they are to consider, in estimating the damages, the injuries to the plaintiff, Wilson A. McCloskey, and the damages resulting therefrom to him. They are to take into consideration the suffering, including bodily pain, in consequence of such injuries, and also the mental suffering and pain attendant upon and the natural incident of such bodily suffering, the character and extent of his physical disability, and whether the injury is permanent or otherwise.

You take that into consideration. You are not entitled to allow this plaintiff for total disability unless you find it was total; but you can only allow him damages, if you find for the plaintiff, for the diminution in his ability to do manual work. You are entitled to allow him for mental suffering which you may find incident to the bodily suffering.

So, gentlemen, if you find for the plaintiff in this case you must go a step further. You must all agree, of course, and you will select some one of your body to act as foreman for you, who will announce your verdict. If you find for the defendant, when you are asked, you will simply say "For the defendant." If you find for the plaintiff, you will say, "We find for the plaintiff," and then state how much you find for the plaintiff.

Thereupon counsel for the said defendant, after the deliverance of the oral charge of the Court to the jury, renewed each and all of their exceptions to the granting by the Court of the prayers of the plaintiff and to the refusal of the Court to grant each of the prayers heretofore specified offered by and on behalf of the said defendant, which exceptions were then and there noted upon the minutes of the Court.

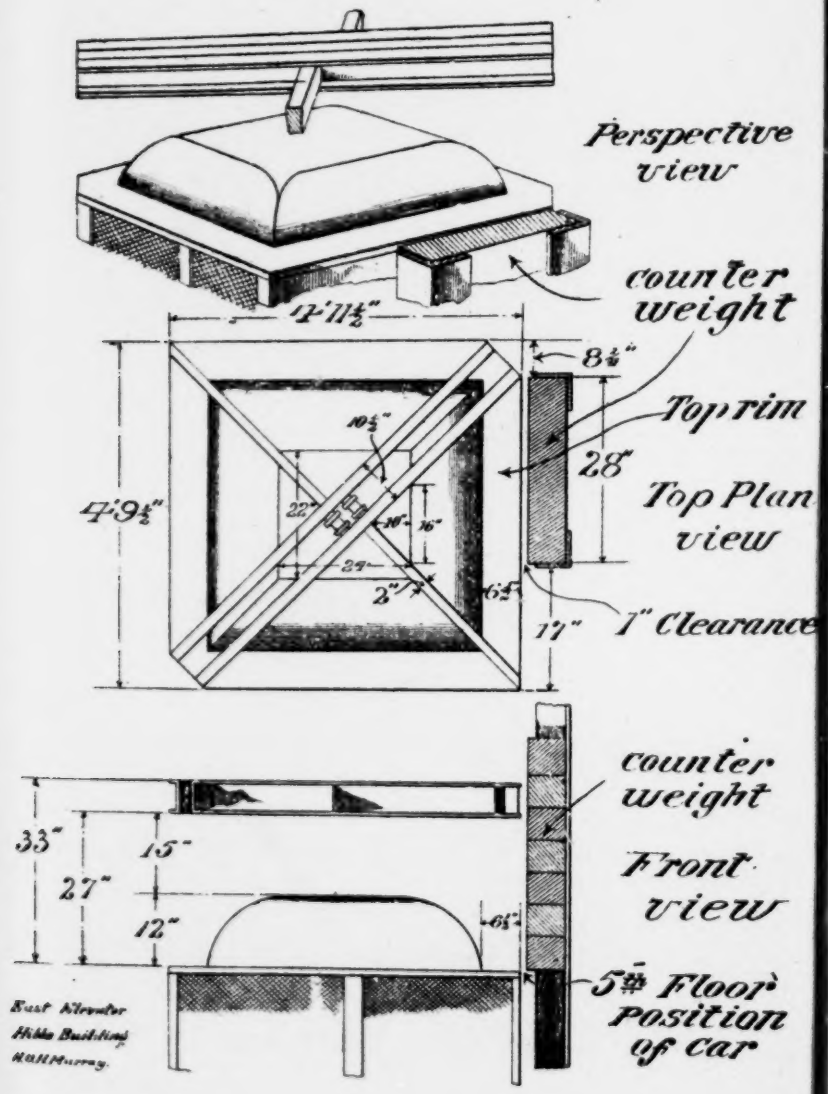
Thereupon counsel for the said defendant interposed an objection to the oral charge of the Court as follows:

"Mr. COLBERT: We desire to renew our exception to that portion of the charge which again finds that Locke was an employé of the Fuller Company. In other respects the charge is satisfactory to us.

"The COURT: You may retire, gentlemen."

But the Court adhered to his instructions to the jury and
105 refused to withdraw, alter or modify the same, to which action of the Court the said defendant, by its counsel, then and there duly excepted and said exceptions were noted at the time upon the minutes of the Court.

After the noting of said exceptions hereinbefore set forth, and the


Perspective view
counter weight
4'11½"
8¼"
Top rim
28"
Top Plan view
4'9½"
10½"
22"
16"
16"
29"
2"
6½"
17"
1" Clearance
counter weight
33"
15"
27"
12"
6½"
Front view
5th Floor
Position of car
East Wrenter
Hicks Building
Hall Murray.

making the same a part of the record, which is also made a part hereof, and because the matters and things hereinbefore recited are not matters of record, and in order that the said defendant may have its case reviewed on appeal by the proper court, the defendant, the George A. Fuller Company, by its attorney moves the Court to sign and seal this, its Bill of Exceptions, to have the same force and effect as if each and every one of said exceptions had been separately signed and sealed, which motion is by the Court granted; and thereupon the said defendant tenders this, its Bill of Exceptions, and requests the Court to sign and seal the same according to the statute in such cases made and provided and it is accordingly done, now, for then, this 24th day of February A. D. 1910.

HARRY M. CLABAUGH,
[SEAL.] *Chief Justice.*

Settled by consent
E. S. DUVAL, JR.,
M. J. COLBERT,
For Def't Fuller Co.
S. V. HAYDEN,
HAYDEN JOHNSON,
For Plaintiff.

Memorandum.

February 25, 1910.—Time to file transcript of record extended from time to time to and including April 15th, 1910.

(Here follows plan of elevator, marked page 104.)

Directions to Clerk for Preparation of Transcript of Record.

Filed February 25, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 50782.

WILSON MCCLOSKEY, Plaintiff,
v.
GEORGE A. FULLER COMPANY and THE OTIS ELEVATOR COMPANY, Defendants.

The Clerk of said Court will please prepare a transcript of the record on appeal, for the Court of Appeals, in the above entitled cause, to include the below mentioned items, namely:

106 Declaration Filed July 18, 1908.
Pleas Filed July 28, 1908.
Joinder of Issue Filed August 11, 1908.
Leave to Amend Decl. etc. Filed November 20, 1908.
Verdict for Def't Otis Elev. Co. Filed October 13, 1909.
Verdict for Pl'ff vs. Def't George A. Fuller Co. October 19, 1909.
Judg't for Def't Otis Elev. Co. October 20, 1909.
Judg't for Pl'ff vs. Geo. A. Fuller Co., Appeal etc., October 29, 1909.
MEMO.—Appeal Bond filed November 1, 1909.
MEMO.—Bill of Exceptions submitted December 13, 1909.
MEMO.—Time to File transcript of record extended to Jan. 15, 1910 December 13, 1909.
MEMO.—Time to file Transcript of Record extended to Feb. 15, 1910 January 14, 1910.
MEMO.—Time to file Transcript of Record extended to Mar. 15, 1910 January 31, 1910.
Order making Bill of Exceptions of Record February 24, 1910.
Bill of Exceptions filed February 24, 1910.
This designation filed February 25, 1910.

EDWARD S. DUVALL, JR.,
M. J. COLBERT,
Attorneys for Def't George A. Fuller Company.

Memorandum.

April 11, 1910.—Time to file transcript of record further extended to and including April 20th, 1910.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 127, both inclusive, to be a true and correct transcript according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 50782 at Law, wherein Wilson A. McCloskey is Plaintiff and George A. Fuller Company is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 18th day of April, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2153. George A. Fuller Company, Appellant, vs. Wilson A. McCloskey. Court of Appeals, District of Columbia. Filed Apr. 18, 1910. Henry W. Hodges, clerk.

)7 No. 2153.

GEORGE A. FULLER COMPANY, Appellant,
vs.
WILSON A. MCCLOSKEY.

WEDNESDAY, October 19th, A. D. 1910.

The argument in the above entitled cause was commenced by Mr. . S. Duvall, Jr., attorney for the appellant, and was continued by essrs. Hayden Johnson and S. V. Hayden, attorneys for the ap-ellee, and was concluded by Mr. M. J. Colbert, attorney for the ppellant.

In the Court of Appeals of the District of Columbia.

No. 2153.

GEORGE A. FULLER COMPANY, Appellant,
vs.
WILSON A. MCCLOSKEY, Appellee.

Opinion.

(Mr. Justice ROBB delivered the opinion of the Court:)

By this appeal the appellant, who was one of the two defendants elow, and who will be designated as defendant here, seeks a reversal f the judgment of the Supreme Court of the District of Columbia pon a verdict in favor of appellee, plaintiff below, in an action for he recovery of damages occasioned by the alleged negligence of he defendant's elevator operator in failing to stop the elevator, on hich the plaintiff was riding, as directed by plaintiff.

The defendant company contracted with William B. Hibbs to rect for him an office building on 15th Street in this city. The ork was to be completed by a time certain. This contract did not nclude the installation of an elevator. That work was provided for n a contract between Hibbs and the Otis Elevator Company. The evator company installed its elevator long before the completion of he building. This elevator, down to the time of the injury to the laintiff, had not been turned over to the owner of the building, but as operated by an employee of the Otis Company, who was paid nd generally controlled by that company. After its installation he defendant company entered into an arrangement with the ele-ator company by which it became entitled to use this elevator in he prosecution of its work, paying to the elevator company three ollars per day, which was to cover the wages of the caretaker or perator aforesaid, the Otis Company reserving the primary right o use the elevator. Under this arrangement the defendant company as to have no control over the elevator operator other than to notify him when to start and when to stop his machine.

08 The defendant company entered into a sub contract with the Robert E. Mackay Company of New York for the paint-

ing required by its contract with Mr. Hibbs. The plaintiff was an employee of the Mackay Company. The elevator shaft was included in this sub contract. To paint this it was of course necessary that some means be provided whereby workmen could ascend and descend the shaft. Therefore the Mackay Company entered into an agreement with the defendant company by which the defendant company agreed to furnish the Mackay Company, for use in painting said shaft elevator, power and operator at any time that the elevator company or the defendant company did not want them. Nothing whatever was said about the arrangement between the elevator company and the defendant company, the agreement between the Mackay and the defendant company proceeding upon the theory that the equipment and elevator were under the control of the defendant company. The Mackay Company was not to have, and in fact did not have, any control over the operator other than to direct him when to start and when to stop his elevator while thus temporarily used as a movable staging.

Upon the day of the accident plaintiff and another workman were on the roof of the elevator touching up the walls of the shaft. They had worked down until the floor of the car was on a level with the first floor of the building. To finish the walls of the shaft between the first and second floors of the building, the space then occupied by the body of the car, it became necessary to get under the car. To do this it was necessary for the painters to be taken to the next or second floor landing. The plaintiff was standing on the rim or ledge around the top of the car and facing the centre of the car. He had a paint box and brush in his hands. The other painter was on another side of the top with his back to the plaintiff. This rim or ledge was about six and one-half inches wide. Plaintiff called to the elevator operator to take him and the other painter up to the second floor and let them off there. There was evidence before the jury that when the car had reached a point where plaintiff had directed that it be stopped the car paused and suddenly started again, throwing plaintiff off his balance, which he was unable to regain until the car had reached the fifth floor, where he was caught in the weights which passed the car at that point.

In his declaration the plaintiff avers that the defendant company entered into an agreement with the Mackay Company, for hire, to operate said elevator "so that said company's employees might stand on top of the elevator and that it might be lowered or raised as was necessary in the painting of said shaft and to start and stop said elevator whenever and wherever requested." It is then averred that in pursuance of this contract with the Mackay Company the defendant company employed the Otis Elevator Company to operate and run said elevator in accordance with said agreement. The duty of the defendant company and also of the elevator company is then set forth, and the breach is averred in the following words: "that said plaintiff on the day aforesaid had finished his work, he then being on the top of the said elevator, below the second floor, requested the said defendant Otis Elevator Company, its serv-
109 ants and employees to stop said elevator at the second floor, so that he might get off and alight therefrom; but the said

defendants not regarding their said duties, did so negligently, carelessly and recklessly operate and cause to be operated said elevator, that the same was carried up to the fifth floor where the said weights and elevator met, as aforesaid in direct violation of the request of the plaintiff to stop the same at the second floor."

At the trial of the case the court, without objection on the part of the plaintiff, directed a verdict in favor of the elevator company, the other of the two defendants, there being no evidence to charge that company with any responsibility in the premises.

Before proceeding to a consideration of the various assignments of error, we deem it necessary to direct attention to the violation of Rule V of this court in the preparation of the Bill of Exceptions in this case. We have had occasion heretofore to advert to the apparent disregard on the part of counsel of this rule, and have indicated that upon proper motion such a bill of exceptions would be stricken out and the appeal dismissed. It being apparent that more drastic measures are necessary to enforce a compliance with this rule, we now state that the Court will hereafter feel called upon to take action upon its own motion in such cases. Counsel should make an effort immediately after the trial of a case to agree upon a proper Bill of Exceptions, and if they are unable to reach such an agreement the matter should speedily be brought to the attention of the trial justice whose plain duty it will then be to adjust the differences of counsel and settle a Bill of Exceptions in conformity with the rules of this Court. Such a Bill of Exceptions as is here presented entails a needless burden upon this court and an equally needless expense upon the parties to the suit.

1. It is insisted that "it was error in the trial court to decide as matter of law, under all the evidence, that Locke (the elevator operator) was the servant of the Fuller Company." This assignment of error goes to the root of the case. It is conceded that there was no conflict in the evidence upon the facts relating to Locke's employment. It therefore was the sole province of the court to determine to whom Locke sustained the relation of employee at the time the accident occurred. In other words, it was a question of law and not of fact. Did the court err? We think not. So far as this inquiry is concerned the elevator company may be eliminated from consideration. There was no privity whatever between that Company and the Mackay Company. The defendant company had a limited right to the use of this elevator equipment including the operator. It chose, for a consideration, to furnish to the Mackay company by the hour, upon the conditions previously mentioned, this elevator equipment and operator. The arrangement, therefore, was between the defendant company and the Mackay company, and the defendant company cannot now be heard to say that it did not have authority to make the contract. Eliminating the elevator company the question may be stated thus: The defendant company, to its own advantage, permitted the Mackay Company to use its elevator as a sort of movable staging, but the only control
110 the agreement contemplated and permitted was limited to the right to signal the elevator operator when to start and when

to stop his machine. In no other respect was this operator under the control of the Mackay Company. The moment the defendant company wanted to use this elevator the painters were compelled to suspend work. We do not deem it material whether the amount paid by the Mackay company for this privilege was ultimately credited to the owner of the building or not. The defendant company was the general contractor. It used this elevator in its work. Had any other device been employed by the Mackay company in painting the elevator shaft it is evident that the operation of the elevator would necessarily have been temporarily suspended. It follows that the arrangement between the principal and sub contractor was to their mutual interest. The defendant company was primarily responsible for the painting of this shaft. It had made a sub contract with the Mackay Company to do this work. That the work might be done expeditiously and with as little interruption to its own use of this elevator as possible it said to the Mackay Company, in effect, you may paint this shaft from the top of our elevator when we are not using it, and we will tell Locke (the operator) to operate the elevator to suit your convenience, that is to say, to start the elevator when you signal and to stop it whenever and wherever you wish it stopped. For this service we will charge you one dollar an hour.

Applying the rule announced by the Supreme Court of the United States in the case of the Standard Oil Company vs. Anderson, 212 U. S., 215, followed by this Court in Sonneman vs. Philadelphia, Etc. R. Co., 35 App. D. C., 279, we think the correctness of the ruling of the learned trial Justice is apparent. In the Standard Oil case the plaintiff was a longshoreman in the employ of a master stevedore who was engaged in loading a ship with oil under a contract with the defendant. The plaintiff, while working in the hold, was injured by a load of cases containing oil which had been negligently lowered. The motive power for conveying these cases of oil from the dock to the ship was a steam winch and drum, and the hoisting and lowering was accomplished by means of a tackle, guy ropes and hoisting ropes. The tackle and ropes properly equipped were furnished by the stevedore. The winch and drum were owned by the defendant and placed on its dock at a convenient distance. The work of loading was all done by employees of the stevedore, except the operation of the winch. This was done by a winchman in the general employ of the defendant. The winchman was hired and paid by the defendant, the stevedore agreeing to pay the defendant a certain price per thousand for the hoisting. The stevedore had no control over the winchman except to give him the proper signals for hoisting and lowering. The negligence in that case consisted in lowering a draft of cases before receiving a signal. The court held that the winchman remained the servant of the defendant while performing the work described.

In the Sonneman case the Knox Express Company undertook to haul and load into a car a quantity of iron for one Simon. The
111 defendant railroad company had for a number of years maintained a movable engine in its freight yard equipped with

derrick and boom, which it furnished without charge to those loading heavy articles upon its cars. The engineer was in the general employ of the defendant and could be discharged by it alone. The only control exercised by the shipper over this engineer was to give the signals for hoisting and lowering. The court ruled that the engineer remained the servant of the railroad company while engaged in said work for the express company.

In the present case the elevator operator was not in the general employ of the Mackay Company and was not paid by it. Neither was he subject to its discharge. There was an additional reason for restricting the control of the Mackay Company over this operator. It is well known that an elevator is a more or less dangerous and complicated mechanism, requiring in its operation some special knowledge and skill. The record shows that Locke possessed these qualifications. It is apparent that painters ordinarily would not. For this additional reason the defendant company was unwilling to surrender the general control of this elevator to the Mackay company. In other words, it insisted upon operating the elevator itself, allowing the Mackay Company to do no more than to give the requisite signals to the operator.

2. This assignment of error questions the sufficiency of the plaintiff's declaration and is based solely upon a motion by the defendant, at the close of all the evidence, that the jury be instructed "that under the pleadings and all the evidence their verdict should be for the defendant, the George A. Fuller Company." The defendant now contends that there was no proper allegation of negligence against it in the declaration, and hence that this motion for a verdict should have been granted. It is well settled that such an omnibus motion will not reach such a defect in the declaration, assuming for the moment that such a defect in fact existed. It is not the duty of the trial court but the duty of counsel to examine the declaration and point out such alleged defects, and unless this is done it must be assumed by the appellate court that they were waived. The reason for this rule is very obvious. To illustrate: One of the defences interposed by the defendant at the trial of this case was contributory negligence by the plaintiff. Another that the elevator operator, at the time of the accident, was not its servant but the servant of the Mackay company, and hence the fellow servant of the plaintiff. The trial Justice, nothing having been said as to the sufficiency of the declaration, had no reason to assume that this motion for a verdict was based upon grounds other than those specifically brought to his attention. If the sufficiency of the declaration was to be challenged it was the duty of the defendant to say so, and his failure in that regard was fatal. Mercantile Trust Company vs. Hensey, 205 U. S. 298. We may add, however, that assuming this question properly raised it is without merit. The plaintiff, probably not knowing the existing relation between the original defendants, charged negligence on the part of both, and a breach of duty on the part of
112 this defendant is, we think, sufficiently set forth in the two parts of the declaration already quoted.

3. The defendant asked the court to charge the jury that if the

evidence showed that the accident was occasioned wholly or in part because the plaintiff "had placed himself in an exposed and dangerous position on the top of the elevator when he might readily have placed himself in a safe and secure position, the verdict should be for the defendant." The court granted the charge after amending it so that it read "if the accident to the plaintiff was occasioned wholly or in part by reason of the fact that he had placed himself in an exposed and dangerous position on the *ledge around* the top of the elevator car *with reference to obeying the signals to stop at the second floor, if you find that such signals were given,*" etc. The plaintiff did not desire to go to the fifth floor but, on the contrary, had signalled the operator to stop at the second floor. The evidence showed that he was in no danger from the weights until the elevator reached the fifth floor. What, therefore, would have been reasonable precaution on his part in preparing to ascend to the second floor might have constituted negligence had he been preparing to ascend to the fifth floor. Having this in mind the court properly modified the prayer. Whether, after the plaintiff discovered that his signal to stop at the second floor had been disregarded, he exercised due care, that is, whether he did what a reasonably prudent man would have done in the circumstances to avoid injury, was covered in another part of the charge.

Finding no error in the record the judgment is affirmed with costs.

Affirmed.

October Term, 1910.

No. 2153.

GEORGE A. FULLER COMPANY, Appellant,
vs.
WILSON A. MCCLOSKEY.

Appeal from the Supreme Court of the District of Columbia.

TUESDAY, November 1st, A. D. 1910.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE ROBB,
November 1, 1910.

113 No. 2153.

GEORGE A. FULLER COMPANY, Appellant,
vs.
WILSON A. McCLOSKEY.

FRIDAY, November 11th, A. D. 1910.

On motion of Mr. E. S. Duvall, Jr., of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of eight thousand dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between George A. Fuller Company, appellant, and Wilson A. McCloskey, Appellee, a manifest error hath happened, to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the 11th day of November, in the year of our Lord one thousand nine hundred and ten.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———,

——— ———.

(*Bond on Writ of Error.*)

Know all men by these presents, That we, George A. Fuller Company, as principal, and National Surety Company, as surety, are held and firmly bound unto Wilson A. McCloskey in the full
114 and just sum of Eight thousand Dollars ($8,000) to be paid to the said Wilson A. McCloskey his certain attorney, execu-

tors, administrators, or assigns; to which payment, well and truly to *to* be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 12th day of November, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the said George A. Fuller Company as appellant and the said Wilson A. McCloskey as appellee, designated as No. 2153 on the General Docket thereof a judgment was rendered against the said George A. Fuller Company and the said George A. Fuller Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Wilson A. McCloskey citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said George A. Fuller Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of George A. Fuller Co.]

GEORGE A. FULLER COMPANY, [SEAL.]
By WALTER A. CLOUGH, [SEAL.]
Vice-President.
NATIONAL SURETY COMPANY, [SEAL.]
By JOEL RATHBONE, [SEAL.]
Vice-President.

Attest:
J. R. WELLS,
Ass't Secretary.

[Seal of National Surety Company.]

Sealed and delivered in the presence of—

Attest:
FAULKNER HILL, *Secretary.*

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

Surety Satisfactory.
S. H. HAYDEN,
For Plaintiff.

Endorsed: No. 2153. George A. Fuller Company, Appellant, vs. Wilson A. McCloskey. Supersedeas Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Nov. 15, 1910. Henry W. Hodges, Clerk.

15 UNITED STATES OF AMERICA, *ss:*

To Wilson A. McCloskey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein George A. Fuller Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 15th day of November, in the year of our Lord one thousand nine hundred and ten.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted Nov. 15, 1910.

S. V. HAYDEN,
HAYDEN JOHNSON,
HERBERT L. FRANC,
Counsel for Def't in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov. 15, 1910. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 78 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of George A. Fuller Company, appellant, vs. Wilson A. McCloskey, No. 2153, October Term, 1910, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 15th day of November, A. D. 1910.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,414. District of Columbia Court of Appeals. Term No. 444. George A. Fuller Company, plaintiff in error, vs. Wilson A. McCloskey. Filed November 22d, 1910. File No. 22,414.

116 In the Supreme Court of the United States.

No. 22414, Term No. 444.

GEORGE A. FULLER COMPANY, Plaintiff in Error,
vs.
WILSON A. McCLOSKEY.

Assignment of Errors.

The Court of Appeals erred in sustaining and affirming the action of the trial court—

1. In granting the first prayer of the plaintiff (Rec., p. 55).
2. In granting the second prayer of the plaintiff as amended (Rec., p. 55).
3. In refusing to grant the defendant's first prayer (Rec., p. 56).
4. In refusing to grant the defendant's third prayer as asked (Rec., p. 56).
5. In refusing to grant the defendant's fourth prayer (Rec., pp. 56 and 57).
6. In refusing to grant the defendant's fifth prayer (Rec., p. 57).
7. In refusing to grant the defendant's seventh prayer (Rec., p. 57).
8. In its oral charge, in instructing the jury that the elevator operator, Locke, was for the purposes of the case an employee of the defendant, as will appear by the exception taken (Rec., p. 62).

And the plaintiff in error prays that the judgment of the Court of Appeals may be reversed with directions to remand the cause for a new trial.

Respectfully submitted,

E. S. DUVALL, JR.,
Attorney for Plaintiff in Error.

[Endorsed:] File No. 22,414. Supreme Court U. S., October Term, 1911. Term No. 444. George A. Fuller Company, Pl'ff in Error, vs. Wilson A. McCloskey. Assignment of Errors. Filed December 13, 1911.

117 It is hereby stipulated and agreed by and between the respective parties hereto, through their attorneys of record, as is evidenced by their signatures at the end of this bill of exceptions, that the copies of the aforesaid transcripts of the record in the case of George A. Fuller Company vs. Wilson A. McCloskey, No. 2153, & No. 176 in the Supreme Court of the United States, may be read and referred to on the hearing of this case on appeal for the purpose of showing to the Court on appeal, without being printed at length as a part of the record in this case, the pleadings and proceedings in the trial Court in the case of McCloskey vs. Fuller Company, et al., Law No. 50,782, introduced in evidence by the plaintiff in this case, the same appearing in said transcript,

as well as the matter offered by the defendant in this case and admitted by the Court, all of the same to form a part of this bill of exceptions as fully as if incorporated and set forth herein.

118 Thereupon counsel on both sides announced the testimony closed.

Thereupon counsel for the defendant upon the foregoing, which was all the evidence in the case, moved the Court to instruct the jury to return a verdict for the defendant upon the grounds: that the questions involved in the suit at bar were res judicata; that the question of fact as to the service that Locke, the elevator operator, was rendering at the time of the accident had been fully gone into by the Supreme Court of the District of Columbia, the Court of Appeals and the Supreme Court of the United States on a record substantially similar in all respects to the record in this case; that the question of fact had been concluded against the Fuller Company; and the law growing out of that finding of fact was that the Otis Elevator Company was not responsible; that the George A. Fuller Company was solely responsible, and that Locke was solely their servant; and it was also urged as a ground of the motion, that upon the whole evidence the defendant was entitled to a verdict.

But the Court overruled said motion, the said ruling being as follows:

"The COURT: This motion may be overruled and an exception noted. I should not think of departing from anything that was previously decided by both the Supreme Court of the United States and the Court of Appeals, but after a careful consideration of the case in the Court of Appeals and in the Supreme Court of the United States, I am satisfied that the question presented by this case was not presented in that case nor decided by either of those courts. I think there is evidence in this case which the plaintiff has a right to have submitted to the jury, tending to show certain facts which, if found by the jury, would entitled it to a verdict against the defendants.

I shall state to the jury in my charge what those questions are, and they will be required to determine the question of fact. If the negligence which resulted in damage to McCloskey and which the Fuller Company had to pay for was, in the circumstances of the case, the negligence of the Otis Elevator Company as between the Fuller Company and the Otis Elevator Company, then it is damage which the Fuller Company has a right to recover over against the Otis Elevator Company. In order for that to be found, it
119 must appear that the operator, Mr. Locke, was operating the car for the Otis Company as between the Fuller Company and the Otis Company, that he was acting within the scope of his employment, and in the act of negligence which caused the accident it must appear that that was an act of negligence on his part while he was doing something that the Fuller Company could not control and did not control. The signals had to be given for the operator, Mr. Locke, to stop and start the car, and if those signals

were faulty or negligently given, of course Locke was not to blame and the Otis Company was not to blame; but if the negligence was in failing to obey those signals, then I think the jury, if the other circumstances are found by them, might find that that was the negligence of the Otis Company as between the Otis Company and the Fuller Company. I think all that was decided in the case of McCloskey against the Fuller Company was that as between those two companies the Fuller Company was undertaking to furnish this service, and there was no direct relation between the Mackay Company on the one hand, or McCloskey the workman for the Mackay Company on the one hand, and the Otis Company on the other; the relation was between the Mackay Company and the Fuller Company, and between McCloskey and the Fuller Company, and there was a breach of duty there.

But at the same time I think the evidence tends to show that in this very act which caused the accident, Locke was the Otis Company as between the Fuller Company and the Otis Company. In the other case, of McCloskey vs. The Fuller Company, not only was Locke the agent and servant of the Fuller Company, but the Otis Company itself was the agent of the Fuller Company.

But you see how different the question is when it arises between the Fuller Company and the Otis Company, if the Otis Company had arranged to furnish this service, to furnish an elevator, to furnish an operator in its control except so far as obeying signals was concerned, paid by the Otis Company and liable to be discharged by the Otis Company, although alone and under general instructions as to the running of its elevators. If that was the situation, then the Otis Company might be liable to the Fuller Company although the Fuller Company would be liable to McCloskey. So that I think we shall have to submit the case to the jury
120 and have them decide whether the relation was such as I have indicated or whether the Otis Company and its servant, Locke, at the time when the accident occurred, was acting under this employment or arrangement with the Fuller Company and bound to exercise due care, and whether it failed to exercise due care, and whether that failure occasioned this accident and injury which the Fuller Company have had to answer for.

For example, if I hire a carriage from a livery stable keeper, and a driver, and he drives for me, the driver remains the servant of the livery stable keeper. If I tell him to go down Sixteenth Street that is my act. I am responsible if an accident occurs simply because he goes down Sixteenth Street when he ought not to, when I ought not to have sent him and directed him to go down there. If I tell him to stop at a certain number and it was careless for me, or if injury results because he stopped at that number, that was my act and my fault. But if I told him to stop at a certain number and let me out, and he did stop and let me out, and then before giving me a chance to get out he started up and threw me to the ground and injured me, that was the negligence of the livery stable keeper as much as if the owner of the livery stable was on the box.

If it was arranged between me and the livery stable keeper that I should take somebody in with me to ride, and that person should pay me and not pay the livery stable keeper, and the same thing occurred, and he was injured, it might well be that the driver would be my agent so far as this gentleman was concerned who was riding with me and yet be the agent of the livery stable keeper so far as I was concerned; and if I had to pay the man who was paying me for the ride, I think the livery stable keeper might be bound to reimburse me. It would make no difference whether the injury was to me or to him, whether I had to pay the gentleman who was riding with me in this instance and then recover from the livery stable keeper, or whether the livery stable keeper was bound directly to the man who was riding with me. It comes down to a fine point, of course, but it comes within the general principles of agency, I think. So that will indicate to counsel the general line on which the case will be submitted to the jury, and I think they will be able to argue the question of fact."

121 To which ruling of the Court counsel for the defendant duly excepted and said exception was allowed by the Court.

And thereupon the following occurred:

["Mr. FLANNERY: And also (take an exception) to your deciding this question of fact as to the service of Locke.

The COURT: I do not decide any question of fact about that, Mr. Flannery. The declaration proceeds upon the theory that the Fuller Company was held liable in the other case to McCloskey and that Locke was the agent of the Fuller Company in that case—we have to take that to be the law—and the Fuller Company was liable and had to pay. There is no argument about that; there cannot be any further; that is settled by the previous case.

But as to the question of fact, I mean to say that which is indicated; that is for the jury to find, but there is evidence tending to show that, and they have to find the fact before the plaintiff can recover. I will explain that to the jury more fully when it comes to the charge.]

The foregoing insertions in brackets were made at the request of counsel for the plaintiff.

Mr. FLANNERY: I understand your Honor overruled my motion and all the grounds therefor: First, as to the plea of res judicata; second, that this question of fact had been settled and concluded; third, that they were estopped by their action in the Court of Appeals in taking the position that this was a transfer of the operator from the Otis Company to them, and by them to the Mackay Company.

The COURT: The motion was overruled, and the grounds were such as you state."

And thereupon upon a question propounded by one of the jurors, counsel for the defendant conceded that there was no question that Locke, the elevator operator, was in the general service of the Otis Elevator Company and was being paid by that company.

122 Thereupon the Court of its own motion charged the jury as follows:

"Gentlemen of the jury, the question in this case, as in every other that comes before you, is whether the plaintiff has made out the allegations contained in his declaration, so that I must call your attention to what is set out here in the declaration. If this is true, the plaintiff is entitled to a verdict, because the declaration is good in law. If it had not been, it would have been demurred to and held insufficient.

"The declaration alleges that the Fuller Company sues the Otis Company for that the Fuller Company, on August 9, 1907, and for some time before, was and had been engaged in constructing an office building, the Hibbs Building, here in Washington, and that on that date there were certain passenger elevators which had already been installed by the Otis Company under an agreement between the Otis Comapny and Hibbs; that these elevators had not been delivered by the Otis Company to Hibbs, but were still in the possession of the Otis Company and under its direction and control, and that on the 9th day of August as well as before and after the Otis Company operated these elevators for the carriage of
123 passengers and material and to do other work for hire, and that the Fuller Company hired the Otis Company to operate one of the elevators for the use and benefit of the Fuller Company and for the use and benefit of other persons lawfully in the building; and that the Fuller Company agreed to pay the Otis Company and did pay them $3. a day for the service; and that the Otis Company, through its agents and servants, did so operate; and the declaration alleges that thereupon it became the duty of the Otis Company and this employee to operate the elevator with care; but the plaintiff, the Fuller Company, says that on this date in question, McCloskey, a painter in the employ of the Mackay Company and not in the employ of the Fuller Company, was lawfully on the top of the elevator so being operated by the Otis Company, and desiring to go up thereon from the first floor to the second floor for the purpose of getting off the elevator, McCloskey directed the Otis Company and its employee to stop at the second floor; but that the Otis Company and its employee, in violation of its duty aforesaid did, so carelessly and negligently operate the elevator that it was caused to go above and beyond the second floor, carrying McCloskey with it; and then it describes how the accident occurred by McCloskey's foot being caught between the car and the counter balance weight, and that he was injured, and brought a suit in this court for those injuries and recovered a judgment against the Fuller Company, stating the amount of the judgment; and that that judgment was affirmed in the Court of Appeals and in the Supreme Court of the United States, and that the Fuller Company had the judgment to pay, stating the amount paid; and that the Otis Company has not reimbursed the Fuller Company for this expenditure.
124 Wherefore the Fuller Company brings this action for reimbursement.

"If you have followed that analysis of the declaration, you have seen what things the plaintiff must prove. You see there can be no liability here on the part of this defendant for the negligence of

Locke who was operating this car, unless Locke at the time when he was guilty of that negligence was acting as the servant and agent of the Otis Company.

"The position of the Otis Company is that he was not acting as their servant and agent at the time when this accident occurred, but on the contrary was acting as the agent and servant of the Fuller Company itself, and evidence has been introduced here which you are to take into consideration in deciding that question. As between this plaintiff and this defendant, the question of agency is entirely different from the question that was presented in the other case, of McCloskey against the Fuller Company. This question comes up between the two companies. As between them, looking at the arrangement between those two companies, you have got to decide whether Locke was the agent and servant of the one or the other.

"A person is an agent or servant of another when he is under the direction and control of that other, and he is his servant and agent only so far as he is under the direction and control of that other. That is the very essence of the relationship of master and servant; the servant is under the control of the master. So far as he is under that control, that is so far as the master has the right to tell him not only what to do but how to do it, he is the servant of the master.

"In this case Locke was running this elevator. It seems
125 that he was running it up and down for various purposes, on the demand of the Fuller Company, and signals were given to him which he was to obey. He was told what floor to go to, or at what point between the floors he was to stop his car. In other words, he was told what to do. And he was paid originally by the Otis Company, and the Fuller Company paid the Otis Company enough to cover his wages and some other matters. He was selected by the Otis Company, subject to dismissal by them. When he was not working the elevator at the instance and request of the Fuller Company, he was operating it for his general employers, the Otis Company, and under their direction and control. Now, was he turned over with the elevator to the Fuller Company so that they had the right not only to tell him what to do but to tell him how to do it? Did they control his operation of the car in all respects? Was that the fair understanding between the two companies, that during the hours or the times when the elevator was being used for the purposes of the Fuller Company, this elevator operator should be entirely under the control and direction of the Fuller Company and bound to do what the Fuller Company said, in the way the Fuller Company directed? If so, then Locke was the servant of the Fuller Company, and of course there could be no recovery in this case. But the plaintiff claims that he was not so under their control, that they were to tell him what to do but not to tell him how to do it; that they could tell him to stop at a certain floor or to carry up a certain load, or to stop between the floors, but that he was under the direction and control of the Otis Company as to how he should run his car, at what speed he should run it, how he should operate it, provided he
126 did the thing they asked him to do. The plaintiff contends on this evidence that the manner of doing it was in the con-

trol and direction of the Otis Company. That is a question of fact for you. If he was under the direction and control of the Otis Company as to how he should do the things he was told to do, and if his negligence occurred in the way he did it—in the how instead of in the what—why, then of course it was the negligence of his employer, the Otis Company, who had a right to direct how he should do it. So that there is where the case turns, so far as that point is concerned; and you must decide the question. I cannot decide it. It is a question of fact. You must draw your inference from the evidence and make up your minds as to which company he was the servant of in the very matter as to which he was negligent, if you find him negligent. There is another point you must consider very carefully. If he was the servant of the Otis Company at the time when this accident occurred, and in the doing of the thing as to which he was negligent, if you find him negligent, then was he doing something at that time which the Otis Company had hired him out to do, or was he doing something which they had not hired him out to do? If he was doing something they had not hired him out to do then he was outside of the scope of his employment as a servant of the Otis Company, and the Otis Company would not be liable. He was then acting entirely for the Fuller Company, and they could not hold the Otis Company for what he did then.

"So that there is this question of fact which has been argued to you by the counsel and which inheres in the evidence in the case, and it must be decided by you. Was it fairly within the understanding and contemplation of the parties, the Fuller Company and the Otis Company, that this elevator should be used for the
127 purpose for which it was being used at the time the accident occurred? Had the Otis Company let the car for that purpose among others, and was it receiving pay among other things for that purpose as well as for the other? If it was not, if that was outside of the purpose for which they let the car, then they are not to be held responsible in this case.

"You will have noticed in the declaration the plaintiff, the Fuller Company, alleges that McCloskey was injured through the carelessness of Locke, and that is an essential allegation to be proved in this case on such evidence as you have before you touching the manner in which the accident occurred. If you find the other points in favor of the plaintiff, the points of which I have been speaking, then the question is, was Locke negligent as charged in the declaration, and did the injury to McCloskey result directly from that negligence of Locke?

"We may perhaps somewhat simplify this case if we treat it in this way: We have here the George A. Fuller Company. Now, suppose we say 'Fuller.' Suppose it had been Mr. Fuller, in the old way of doing things when individuals instead of corporations did the work of the world. On the other hand, let us call the Otis Elevator Company 'Otis', and this Mackay Company were allowed to use the elevator under the right that Fuller had. If you find that that was a use which was contemplated between Fuller and Otis, why then it was exactly the same as if Fuller had been using the car instead of

Mackay, and it makes no difference whether it was Mackay or Mackay's man McCloskey, and McCloskey using the car under the direction of Fuller. If you find that that was the arrangement between the two companies then it is the same as if Fuller was using it himself instead of Mackay or McCloskey, and exactly the
128 same as if Fuller had been on the top of that elevator himself. That will reduce it to its lowest terms on that side.

"Suppose Fuller, the plaintiff himself, had been painting the elevator shaft and riding on the top of this car. Now, whom have we on the other side? We have a man in the elevator named Locke who was running the car. If you have found under the rule I have stated to you, and the law I have stated to you, that Locke was at that time the servant and agent of Fuller, then Fuller was on top of the car and he was inside the car both, running it; because Locke would be his agent and servant; and of course in that case there could not be any recovery. If Fuller inside the car ran the elevator so that Fuller outside the car got hurt, of course Fuller is the only man to blame.

"But if you have found that Locke inside the car was not Fuller but was Otis—that is, was the agent and servant of Otis—then you have Otis inside of the car running it and Fuller on top of the car being carried. Then what is the situation; what occurs? If Fuller told him 'I want to get off at the second floor,' and Otis inside the car, instead of stopping at the second floor, only momentarily paused and then let the car go and caught Fuller on top of the car and injured him, of course Otis would be liable; Otis who was running the car on the inside would be liable to Fuller who was riding on the outside.

"That reduces the case to its lowest terms, when you leave out sub-contractors and agents and all that. But you have got to decide these questions of agency and see just what the relationship of the parties was; and if you find that this man was careless in the respect charged in the declaration—the man Locke—and that at
129 that time and in being so careless he was the servant and agent of the Otis Company, so far as the Fuller Company was concerned, then the Fuller Company has a right to recover as much as if it was one of the Fuller Company's own men, or Mr. Fuller himself, if he had been the individual in this case; and what he had to pay to McCloskey is damage properly recoverable against the Otis Company, and there is no dispute, I understand, as to the amount that the Fuller Company did have to pay.

"I think I cannot help you any more about the case, gentlemen. You will have to decide these questions of fact in accordance with these rules of law, and render your verdict accordingly. Exceptions may be noted."

130 And thereupon counsel for the defendant before the jury retired renewed his exceptions to the overruling of his motion, and objected and excepted to so much of the Court's oral charge as instructed the jury that there was a difference in this case between the question of agency in the case of Fuller vs. McCloskey and the

case at bar; also objected and excepted to the Court's leaving to the jury the question of fact as to whether or not the man Locke was the servant, employee and agent of the Otis Company; also objected and excepted to what the Court said about where the case turned in the illustrations given about the matter of agency; also objected and excepted to leaving the question of the negligence of Locke to the jury, because, under the declaration, the plaintiff had failed to sufficiently prove the allegations of the pleading. And the said exceptions were severally allowed by the Court.

Be it remembered that each of the separate and several exceptions taken by counsel for the defendant, as hereinbefore set forth in this bill of exceptions, were so taken by the said counsel then and there, before the jury retired, separately and severally, and said exceptions were then and there, separately and severally, duly noted upon the minutes of the Justice presiding at the trial, and at the request of counsel for the defendant this bill of exceptions, which contains all of the evidence given at the trial and all of the proceedings had therein, is signed and sealed and made a part of the record in this cause, this 7th day of May, A. D. 1915.

WENDELL P. STAFFORD, *Justice.*

Settled by consent, this 7th day of May, A. D. 1915.

EDWARD S. DUVALL, JR.,
Attorney for Plaintiff.

McKENNEY & FLANNERY,
Attorney- for Defendant.

[Endorsed:] Law. No. 56467. In the Supreme Court of the District of Columbia. George A. Fuller Company vs. Otis Elevator Company. Bill of exceptions. Duplicate. McKenney & Flannery, Washington, D. C., Hibbs Building. Wayne MacVeagh, Frederic D. McKenney, John Spalding Flannery, G. Bowdoin Craighill, W. Clayton Carpenter.

Endorsed on cover: District of Columbia Supreme Court. No. 2829. Otis Elevator Co., &c., appellant, vs. George A. Fuller Co., &c. Court of Appeals, District of Columbia. Filed May 24, 1915. Henry W. Hodges, Clerk.

Wednesday, November 3d, A. D., 1915.

OTIS ELEVATOR COMPANY, A CORPORATION, *Appellant*,
vs.
GEORGE A. FULLER COMPANY, A CORPORATION. } No. 2829.

The argument in the above entitled cause was commenced by Mr. J. S. Flannery, attorney for the appellant, and was continued by Mr. E. S. Duvall, Jr., attorney for the appellee, and was concluded by Mr. J. S. Flannery, attorney for the appellant.

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COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OTIS ELEVATOR COMPANY, A CORPORATION, *Appellant*,

v.

GEORGE A. FULLER COMPANY, A CORPORATION, *Appellee*.

No. 2829.

OPINION.

Mr. Justice Van Orsdell delivered the opinion of the Court:

This appeal is from a judgment of the Supreme Court of the District of Columbia in favor of appellee, the Fuller Company, in an action brought against the appellant, the Otis Company, to recover the amount expended by it in satisfaction of a judgment and costs in an action at law for damages instituted by one McCloskey against the Fuller Company and the Otis Company, as joint defendants. In that case, on plaintiff's evidence, the court without objection from plaintiff McCloskey or the co-defendant, the Fuller

Company, directed the jury to return a verdict in favor of the Otis Company. The trial resulted in a judgment against the Fuller Company, which it seeks in this action to recover from its co-defendant, the Otis Company. From the original judgment, the Fuller Company appealed to this court (35 App. D. C., 595), where the judgment was affirmed. Writ of error was then taken to the Supreme Court of the United States (228 U. S., 194), where the judgment was again affirmed.

The facts in the original case are succinctly stated in the opinion of Mr. Justice Robb, as follows:

"The defendant company contracted with William B. Hibbs to erect for him an office building on Fifteenth Street in this city. The work was to be completed by a time certain. This contract did not include the installation of an elevator. That work was provided for in a contract between Hibbs and the Otis Elevator Company. The elevator company installed its elevator long before the completion of the building. This elevator, down to the time of the injury to the plaintiff, had not been turned over to the owner of the building, but was operated by an employee of the Otis Company, who was paid and generally controlled by that company. After its installation the defendant company entered into an arrangement with the elevator company by which it became entitled to use this elevator in the prosecution of its work, paying to the elevator company $3 per day, which was to cover the wages of the caretaker or operator aforesaid, the Otis Company reserving the primary right to use the elevator. Under this arrangement the defendant company was to have no control over the elevator operator, other than to notify him when to start and when to stop his machine.

"The defendant company entered into a sub-contract with the Robert E. Mackay Company of New York for the painting required by its contract with Mr. Hibbs. The plaintiff was an employee of the Mackay Company. The elevator shaft was included in this sub-contract. To paint this it was, of course, necessary that some means be provided whereby workmen could ascend and descend the shaft. Therefore the Mackay Company entered into an agreement

with the defendant company by which the defendant company agreed to furnish the Mackay Company for use in painting said shaft, elevator, power and operator at any time that the elevator company or the defendant company did not want them. Nothing whatever was said about the arrangement between the elevator company and the defendant company, the agreement between the Mackay and the defendant company proceeding upon the theory that the equipment and elevator were under the control of the defendant company. The Mackay Company was not to have, and in fact did not have, any control over the operator other than to direct him when to start and when to stop his elevator while thus temporarily used as a movable staging.

"Upon the day of the accident, plaintiff and another workman were on the roof of the elevator, touching up the walls of the shaft. They had worked down until the floor of the car was on a level with the first floor of the building. To finish the walls of the shaft between the first and second floors of the building, the space then occupied by the body of the car, it became necessary to get under the car. To do this it was necessary for the painters to be taken to the next or second floor landing. The plaintiff was standing on the rim or ledge around the top of the car, and facing the center of the car. He had a paint box and brush in his hands. The other painter was on another side of the
113 top, with his back to the plaintiff. This rim or ledge was about 6½ inches wide. Plaintiff called to the elevator operator to take him and the other painter up to the second floor, and let them off there. There was evidence before the jury that when the car had reached a point where plaintiff had directed that it be stopped the car paused and suddenly started again, throwing plaintiff off his balance, which he was unable to regain until the car had reached the fifth floor, where he was caught in the weights which passed the car at that point."

When the taking of testimony was concluded, defendant moved the court to instruct the jury to return a verdict in its favor. This instruction was refused. The case was submitted to the jury, with a verdict and judgment thereon for plaintiff, the Fuller Company.

Defendant, Otis Company, for a fourth plea to the declaration, set up the record and judgment in the former suit as a bar to plaintiff's right to recover. In support of this plea, it urged that the judgment in its favor, when sued jointly with the Fuller Company by McCloskey, is a bar to this action. We are not impressed with this contention. In the original suit, McCloskey, controlled the evidence. He was satisfied to make out a case against one of the defendants. Defendants were not adversary litigants in the sense that they could try out an issue of liability between themselves in that action. For example, the Otis Company might have indemnified the Fuller Company against the very thing that happened, which would be determinative of this case, but not material in establishing the liability of the Fuller Company to McCloskey. Indeed, McCloskey might have sued the Fuller Company separately, or, having sued them jointly, might have dismissed the case as to the Otis Company, and it would hardly be held that a judgment against the Fuller Company under those circumstances would operate as a bar to the subsequent action for indemnity. If the Fuller Company has a cause of action in the present suit, the way was not open for it to secure an adjudication of that right in the original case. The rule seems to be general that, in actions for indemnity between joint defendants, the original record and judgment will not constitute a valid plea in bar. Owensboro Co. v. Westinghouse Co., 91 C. C. A., 335; Pullman Co. v. Cincinnati, etc., R. R. Co., 147 Ky., 498; Oceanic Co. v. Comp. Trans. Espanola, 134 N. Y., 461; Churchill v. Holt, 127 Mass., 165; King v. Chase, 15 N. H., 9; O'Connor v. N. Y. Im. Co., 28 N. Y. Supp., 544.

But, while the plea of *res judicata* can not be sustained in the present action, the main points essential to recovery here were adjudicated in the original suit on substantially the same evidence as that upon which the Fuller Company now pitches its case. In so far as these matters were disposed of in the former case, plaintiff will be estopped to invoke their aid here. Where there is a second action upon a different claim or demand between parties to the former suit involving issues there adjudicated, the judgment in the prior action will operate only as an estoppel as to those matters

in issue or points controverted upon which the finding or verdict was rendered, in so far as they bear upon the issues in the second action. "In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." Cromwell v. County of Sac, 94 U. S., 351. Thus, while the former judgment is not *res judicata*, either as to all matters in issue, or as to those matters which might have been put in issue, plaintiff is estopped upon the same evidence to again put in issue any matters essential to recovery here which, upon issue joined to which it was a party, were adjudicated in the prior action.

This brings us to the consideration of the matters here in issue which were in issue and adjudicated in the former action. This case turns upon the scope of the contract between the Otis Company and the Fuller Company for the use by the latter of the elevator and the operator Locke. In the former case, Mr. Justice Robb, speaking for this court, said: "At the trial of the case the court, without objection on the part of the plaintiff, directed a verdict in favor of the elevator company, the other of the two defendants, there being no evidence to charge that company with any responsibility in the premises." Mr. Justice Hughes, speaking for the Supreme Court of the United States, in relation to the same matter, said: "In the present case, the Fuller Company obtained the use of the elevator, and the operator, from the Otis Company, and paid therefor. But the Otis Company had nothing to do with the arrangement with the Mackay Company. To this transaction, and to the employing of the top of the elevator as a movable platform for the painters, the Otis Company was a stranger. The Fuller Company, having obtained the use of the elevator, agreed to supply it to the Mackay Company and undertook to furnish that company with the necessary service in operating it; it asserted control for this purpose, and assumed the duty of operating with proper care."

The evidence touching the agreement between the Otis Company and the Fuller Company relative to the use of the car is substantially the same as in the prior case. There, they were jointly charged with negligence. The nature of the agreement for the use of the car was gone into fully for the obvious purpose of fixing responsibility, and especially to determine whose servant Locke, the operator, was at the time of the accident. In the present case, a studious attempt has been made on the part of the Fuller Company to qualify the evidence given by its employees in the prior case by asserting that it contracted with the Otis Company for "elevator service," instead or for the hiring of the car, equipment and operator outright. If this were now an open question, the nature of the contract would have to be determined from the facts, and not from any characterization which the Fuller Company might choose to place upon it.

We now come to the crucial issue in both cases, whose servant was Locke, the operator, at the time the accident occurred? Again we are remanded to the former case. In the opinion of this court, Mr. Justice Robb said: "It is insisted that 'it was error in the trial court to decide as
114 matter of law, under all the evidence that Locke (the elevator operator) was the servant of the Fuller Company.' This assignment of error goes to the root of the case. It is conceded that there was no conflict in the evidence upon the facts relating to Locke's employment. It therefore was the sole province of the court to determine to whom Locke sustained the relation of employee at the time the accident occurred. In other words, it was a question of law, and not of fact. Did the court err? We think not. So far as this inquiry is concerned, the elevator company may be eliminated from consideration." This view was sustained by the Supreme Court in the following language: "The principal argument for reversal is based on the ruling of the trial court that Locke, the operator of the elevator, was the servant of the Fuller Company. The court below approved this ruling and we find no error in its conclusion. So far as Locke's employment was concerned, there was no dispute as to any matters of fact and the question of the liability of the Fuller Company for his negligence, if he was negligent in the operation of the elevator, was one of law."

With the status of Locke fixed in the prior case as the servant of the Fuller Company, based upon the further adjudication that the Fuller Company hired the use of the elevator and Locke, the operator, outright, the Fuller Company is estopped by that judgment, now, upon the same evidence there adduced, to shift its position in a suit for indemnity against its co-defendant. The matters thus adjudicated in the former case lie at the root of the right to recover here. It is clear, therefore, that, with these matters foreclosed by the former adjudication, the foundation for the present suit is left too weak to support a right of recovery by the Fuller Company.

It having been settled that the Otis Company turned over the elevator and the operator to be used by the Fuller Company, it follows that it did not retain such control as would make it primarily liable for the accident which befell McCloskey. Eliminating the Mackay Company from responsibility, as was done in the former case, and with which we are not here concerned, we have a situation closely analogous to that presented in the case of Byrne v. Kansas City, Ft. S. & M. R. R. Co., 61 Fed., 605. In that case the railway company rented its engine and crew to the Kansas City & M. R. & Bridge Company. The bridge company controlled the bridge and the operation of all trains of a number of railway lines over the bridge. The bridge company paid the railway company for the use of the engine $10 per day, and also paid the railway company the expense of fuel and supplies used in running the engine and the wages of the engineer and fireman, who were carried on the pay-rolls of the railway company. The accident happened through the negligence of the engineer in operating the engine. The question was squarely presented whether the contract by which the railway company rented its engine and crew to the bridge company relieved it from liability for negligence in the operation of the engine while in the service of the bridge company.

On this state of facts, Judge Taft, speaking for the Circuit Court of Appeals, said: "We are clearly of the opinion that the court was right in holding that the railway company was not responsible for the acts of the engineer

and fireman in running the engine which killed Nason. They were, it is true, general servants of the railway company, but at the time of the accident they were engaged in the work of the bridge company, were subject to the orders of the bridge company's officers, and in what they did or failed to do were acting for the bridge company. The question is one of agency. The result is determined by the answer to the further questions, whose work was the servant doing? and under whose control was he doing it? The railway company had simply lent its general servants to become special or particular servants of the bridge company, had for the time parted with control over them, and was not responsible for their acts while in the service and under the control of their temporary master." This rule is well supported by both English and American cases. Donovan v. Construction Syndicate, 1 Q. B. (1893), 629; Rourke v. Colliery Co., 2 C. P. Div., 205; Powell v. Construction Co., 88 Tenn., 692; Miller v. Railroad Co., 76 Iowa, 655; Gahagan v. Aermotor Co., 67 Minn., 252; Clapp v. Kemp, 122 Mass., 481.

In Donovan v. Construction Syndicate, *supra*, where defendant had rented a crane and operator to another company to be used in loading a ship at a wharf, discussing the question of primary liability, Lord Esher said: "In this case the crane and the man to work it were lent by the defendants to Jones & Co. for a consideration, and to be used in the manner I have described. For some purposes, no doubt, the man was the servant of the defendants. Probably, if he had let the crane get out of order by his neglect, and, in consequence, anyone was injured thereby, the defendants might be liable; but the accident in this case did not happen from that cause, but from the manner of working the crane. The man was bound to work the crane according to the orders, and under the entire and absolute control of Jones & Co. That being so, whose servant was the man in charge of the crane as to the working of it? It is true that the defendants selected the man and paid his wages, and these are circumstances which, if nothing else intervened, would be strong to show that he was the servant of the defendants. So, indeed, he was as

to a great many things; but as to the working of the crane he was no longer their servant, but bound to work under the orders of Jones & Co., and if they saw the man misconducting himself in working the crane, or disobeying their orders, they would have a right to discharge him from that employment. This conclusion hardly requires authority, but there is authority for it, without going back to an earlier date, in the case of Rourke v. Colliery Co., 2 C. P. Div., 205."

In the Rourke case, Chief Justice Cockburn stated the rule as follows: "When one person lends his servant to another for a particular employment, the servant for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." This rule was quoted with approval by Mr. Justice Lurton in Powell v. Construction Co., supra.

It is contended, however, that the Fuller Company had no power to discharge Locke, and, therefore, it can
115 not be held liable for his conduct. The rule of liability in cases of this sort depends upon control of the actions of the servant. In this case, it is true that Locke operated the elevator, just as the engineer operated the engine, or the man operated the crane; but when and where to operate was within the control of the Fuller Company. Here, the elevator moved upon a fixed track, as did the engines in the railway cases. Undoubtedly, if the accident had been occasioned by a defect in the elevator, we would have a different case; but the accident was caused by the movement of the elevator, a matter within the control of the Fuller Company.

The learned justice below indicated in a colloquy with counsel that he regarded the present case controlled by what is known as the carriage cases. It is undoubtedly settled that where one hires a carriage, horse and driver for a given purpose, and exercises no more control over the driver than to indicate where he desires to be taken or by what route he wishes to be conveyed to his destination, he can not be held liable for the negligence of the driver. But, as indicated by Mr. Justice Field, in Little v. Hackett,

116 U. S., 366, this rule has no application where the master has given over to another the control of his servant. The distinction is clearly pointed out by Lord Bowen in Donovan v. Construction Syndicate, *supra*, as follows: "The principal part of the argument for the plaintiff was founded on what may be called the Carriage Cases—Laugher v. Pointer (5 Barn. & C., 547), and Quarman v. Burnett (6 Mees. & W., 499)—but they really have nothing to do with the point presented in this appeal. If a man lets out a carriage on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The coachman does not become the servant of the person he is driving, and, if the coachman acts wrongfully, the hirer can only complain to the owner of the carriage. If the hirer actively interferes with the driving, and an injury occurs to any one, the hirer may be liable, not as the master, but as the procurer and cause of the wrongful act complained of. In the present case the defendants parted for a time with control over the work of the man in charge of the crane, and their responsibility for his acts ceased for the time."

Here, the control of the movement of the elevator was wholly with the Fuller Company. It took over Locke, the operator, with the elevator. It assumed control of both. It was not a mere temporary use, like the hiring of a carriage for a single trip. The record discloses that the Fuller Company had been using the elevator for more than a month (frequently overtime), when the accident happened, and that it had sublet it to the Mackay Company, a use not contemplated in its agreement with the Otis Company. We think, therefore, in view of the adjudicated facts, which were not open to the consideration of a second jury, there was not such primary liability on the part of the Otis Company as will support an action for indemnity.

Some stress is laid upon the meager testimony to the effect that passengers were occasionally carried on this elevator at and about the time this accident occurred. The only reasonable inference to be drawn from the evidence

is that this service was rendered for the accommodation of the owner of the building. It does not appear that it entered into the contract for the use of the elevator. It follows, therefore, that the elevator was not being operated at this time primarily for the carrying of passengers, and incidentally for the completion of the building, but primarily for the completion of the building, and incidentally for the carrying of passengers. In other words, the passengers were carried for the accommodation of the owner of the building, and this was done by whoever happened to be in control of the elevator. The contention is of no importance.

The judgment is reversed with costs, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

116 Monday, January 3rd, A.D. 1916.

OTIS ELEVATOR COMPANY, A CORPORATION, *Appellant*, vs. GEORGE A. FULLER COMPANY, A CORPORATION. } No. 2829. January Term, 1916.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

per MR. JUSTICE VAN ORSDEL.

January 3, 1916.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

I, HENRY W. HODGES, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 116, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of

OTIS ELEVATOR COMPANY, A CORPORATION, *Appellant,*

vs.

GEORGE A. FULLER COMPANY, A CORPORATION.

No. 2829, January Term, 1916, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 16th day of February, A.D. 1916.

[Seal Court of Appeals]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the District of Columbia, Greeting:

Being informed that there is now pending before you a suit in which Otis Elevator Company is appellant, and George A. Fuller Company is appellee, No. 2829, which suit was removed into the said Court of Appeals by virtue of an appeal from the Supreme Court of the District of Columbia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourteenth day of April, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] 2829. File No. 25,192. Supreme Court of the United States, No. 909, October Term, 1915. George A. Fuller Company vs. Otis Elevator Company. Writ of Certiorari. Court of Appeals, District of Columbia. Filed Apr. 18, 1916. Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia.

No. 2829.

OTIS ELEVATOR COMPANY, Appellant,

vs.

GEORGE A. FULLER COMPANY.

Stipulation.

It is hereby stipulated and agreed on this 20th day of April, 1916, by and between the parties to the above-entitled cause and their counsel of record, that the transcript of record in this cause now on file in the Supreme Court of the United States in the case of George A. Fuller Company, Petitioner, vs. Otis Elevator Company, No. 909 of October Term, 1915, can be taken as the return

of the Court of Appeals herein to the writ of certiorari heretofore issued and directed to said court by the Supreme Court of the United States in said case No. 909.

OTIS ELEVATOR COMPANY,
Appellant,
By McKENNEY & FLANNERY,
Its Attorneys of Record.
GEORGE A. FULLER COMPANY,
By EDWARD S. DUVALL, JR.,
Its Attorney of Record.

No. 2829. Otis Elevator Co. vs. Geo. A. Fuller Co. Stipulation. Court of Appeals, District of Columbia. Filed Apr. 20, 1916. Henry W. Hodges, Clerk.

In obedience to the writ of certiorari filed in this cause and returned herewith, I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, hereby certify the foregoing to be a true copy of the stipulation of counsel filed herein agreeing that the certified copy of the transcript of record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the Court of Appeals to said writ of certiorari.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 21st day of April, A. D. 1916.

HENRY W. HODGES,
Clerk.

[Seal Court of Appeals, District of Columbia, 1893.]

[Endorsed:] File No. 25,192. Supreme Court U. S. October term, 1915. Term No. 909. George A. Fuller Company, Petitioner, vs. Otis Elevator Company. Writ of certiorari and return. Filed April 22, 1916.

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AUTHORITIES.

Supreme Court of the United States

OCTOBER TERM, 1915.

No.

GEORGE A. FULLER COMPANY, A CORPORATION, *Petitioner*,

vs.

OTIS ELEVATOR COMPANY, A CORPORATION, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS, DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the George A. Fuller Company, a corporation, respectfully shows unto this court as follows:

This case grows out of the case of George A. Fuller Company v. McCloskey, 228 U. S., 194, and involves a misapplication of this court's decision in that case, as well as of other decisions of this court, as hereinafter pointed out, and the failure of the lower court to follow this court's decision in Gas Light Co. v. D. C., 161 U. S., 316, which case was used as a precedent for the institution of the present suit.

1. Petitioner is the appellee and respondent is the appellant in case No. 2829 in the Court of Appeals of the

District of Columbia, wherein the judgment of the trial court was reversed, a certified copy of the transcript of the record, including all proceedings in the Court of Appeals, and uncertified copies, as required by this court, be ing submitted herewith.

The appeal by respondent was from a judgment of the Supreme Court of the District of Columbia on a verdict in favor of petitioner in an indemnity action against the respondent—because of its primary liability—to recover the amount expended in satisfaction of a judgment and costs in a negligence action. McCloskey, a painter in the employ of the Robert Mackay Company, a sub-contractor of the Fuller Company, was injured while at work on top of an elevator operated by the Otis Company in the Hibbs office building in this city, then in the finishing stage of completion by the Fuller Company, general contractor. He sued both the Fuller and Otis companies for damages. At the trial, on the completion of the plaintiff's case in chief, the Court on motion of the Otis Company and with the acquiescence of the plaintiff, directed a verdict for that defendant. The trial proceeded against the Fuller Company alone and resulted in a verdict and judgment against it, which was affirmed by the Court of Appeals (35 App. D. C., 595), and **by this court, on error. (228 U. S., 194.)**

After paying the judgment, the present suit was brought by it against the Otis Company for indemnity, under authority of Gas Light Company v. D. C., 161 U. S., 316.

In McCloskey's case, it was decided as between the plaintiff and the Fuller Company, by the verdict and judgment, that "the George A. Fuller Company entered into an *agreement* with said *Robert E. Mackay Company* for hire to operate said elevator * * *; and that in pursuance of *said contract* for use of said elevator, the defendant, the George A. Fuller Company *employed* the *Otis Elevator Company* to run and operate the said elevator * * * during the time

that said elevator shaft was being painted, * * *" (R., p. 30); and, under the instruction of the trial judge upon the state of the evidence, that "as *matter of law* * * * the elevator operator, at the time of the happening of the injury to the plaintiff, must be considered to have been the servant of the defendant, the George A. Fuller Company" (R., p. 83, prayer No. 1). The contract of employment of the Otis Company was deemed inadmissable to defeat McCloskey's claim and was not in evidence.

On error, this Court said. "It must be concluded that the operating of the elevator *under this arrangement with the Mackay Company* was an operating of it by the Fuller Company." (Italics petitioner's.)

In that case, the sole issue was the liability of the Fuller Company to McCloskey, under its **"arrangement with the Mackay Company."**

In the instant case the sole issue is the primary liability of the Otis Company under a *different* contract—**one between it and the Fuller Company,** and the judgment determines, as between them, the primary liability of the Otis Company for the negligence of the operator.

No objection to the introduction of the second contract in evidence was made by the Otis Company. It introduced its bill for the service, rendered to the Fuller Company after the accident (R., p. 13), and urged that the language in which this bill was couched gave rise to the inference that it *hired out* its operator, with the elevator to the Fuller Company. The defendant also offered the record in the McCloskey case under its fourth plea of *res judicata.*

The Otis Company, at the close of all of the testimony, moved the Court to instruct the jury to return a verdict for the defendant on all of the evidence (R., p. 103) and also on the ground that the judgment in the McCloskey case was a bar, and upon the further ground that the fact as to

the status of the elevator operator had been settled and concluded between the Fuller Company and the Otis Company by the judgment in the McCloskey case. This motion, which was equivalent to a demurrer to the evidence, was overruled.

The questions of fact must be considered as determined against the Otis Company by the verdict of the jury; that is, that the Otis Company, by its contract with the Fuller Company, agreed to do this work with its elevator in the Hibbs building, as required by the Mackay Company's employees in the painting of the elevator shaft. (R., pp. 2, 11, 12-17).

2. In reversing the judgment, the Court of Appeals, in its opinion, held that the Fuller Company and the Otis Company were not adversary litigants in the McCloskey case; that the question of primary liability was not in issue and could not have been tried out between them in that suit, and that the McCloskey judgment was not *res judicata* between these two as to any matters there in issue nor even as to matters which might have been put in issue, but held, nevertheless, that that judgment operated as an estoppel in the present suit as to the issue of primary liability, quoting from Cromwell v. County of Sac, 94 U. S., 351, as authority for the proposition that a judgment which did not and could not decide and therefore did not conclude a question between two parties, operates as an estoppel when such question is in issue between these parties for the first time in a subsequent suit based upon a different claim or demand, and the lower court misapplied the decision of this Court in Fuller Co. v. McCloskey, *supra*.

The Court's opinion, in part, is:

> "Defendant, Otis Company, for a fourth plea to the declaration, set up the record and judgment in the former suit as a bar to plaintiff's right to recover. In

support of this plea, it urged that the judgment in its favor, when sued jointly with the Fuller Company by McCloskey, is a bar to this action. We are not impressed with this contention. In the original suit, McCloskey controlled the evidence. He was satisfied to make out a case against one of the defendants. **Defendants were not adversary litigants in the sense that they could try out an issue of liability between themselves in that action.** * * * McCloskey might have dismissed the case as to the Otis Company, and it would hardly be held that a judgment against the Fuller Company under those circumstances would operate as a bar to the subsequent action for indemnity. **If the Fuller Company has a cause of action in the present suit, the way was not open for it to secure an adjudication of that right in the original case.** * * * (Citing many authorities.)

"But, while the plea of *res judicata* can not be sustained in the present action, the main points essential to recovery here were adjudicated in the original suit on substantially the same evidence as that upon which the Fuller Company now pitches its case. In so far as these matters were disposed of in the former case, plaintiff will be estopped to invoke their aid here. * * * 'In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.' Cromwell v. County of Sac, 94 U. S., 351. **Thus, while the former judgment is not res judicata, either as to all matters in issue, or as to those matters which might have been put in issue, plaintiff is estopped upon the same evidence to again put in issue any matters essential to recovery here, which, upon issue joined to which it was a party, were adjudicated in the prior action.**

* * * * * * * * *

"This brings us to the consideration of the matters here in issue which were in issue and adjudicated in the former action.

* * * * * * * * *

"With the status of Locke fixed in the prior case as the servant of the Fuller Company, based upon the further adjudication that the Fuller Company hired the use of the elevator and Locke, the operator. * * * It is clear, therefore, that, with these matters foreclosed by the former adjudication, the foundation for the present suit is left too weak to support a right of recovery by the Fuller Company." (Italics petitioner's.)

3. The decision of the Court of Appeals is in conflict with the following decisions of the Supreme Court of the United States in indemnity cases, which were called to its attention in the brief for appellee below (copy annexed hereto as exhibit) and on the oral argument, and rests upon the apparent misapplication of the principles of estoppel announced in Cromwell v. County of Sac, *supra:*

Gas Light Co. v. D. C., 161 U. S., 316;
Robbins v. Chicago, 4 Wall., 657.

4. The rule announced in those cases is applied generally throughout the Union, in indemnity suits, by the Federal and State courts, including courts of last resort, and the decision of the Court of Appeals is in conflict with decisions of such courts, which were called to its attention in the manner stated and virtually denies the right to recover indemnity in the District of Columbia. Some of these decisions were referred to with approval in the opinion of the Court of Appeals, but the rule as to the effect to be given to the prior judgment was not followed.

Owensboro v. Westinghouse Co., 91 C. C. A., 335;
Pullman Co. v. Cincinnati, etc., R. R. Co., 147 Ky. (App.), 498;
Rubovits v. Trego, 178 Ill. App., 127;

*Oceanic Co. v. Comp. Trans. Espanola, 134 N. Y., 461;
*Lowell v. Boston & L. R. R. Corp., 23 Pick., 24;
*Churchill v. Holt, 127 Mass., 165;
King v. Chase, 15 N. H., 9;
O'Connor v. N. Y. In. Co., 28 N. Y. Supp., 544.

The late Justice Lurton of this Court, then a member of the Circuit Court of Appeals, participated in the decision of Owensboro v. Westinghouse, *supra*, and the cases marked with asterisks were quoted with approval by this court in the case of Gas Light Co. v. D. C., *supra*.

5. The decision of the Court of Appeals, if unreversed, will establish for the trial courts of the District of Columbia a principle of *res judicata* which will be in conflict with the principles announced by the Supreme Court of the United States in the following cases, likewise called to the attention of the court below, and be radically different to that of all other courts in this country:

So. Pac. R. R. Co. v. U. S., 168 U. S., 1;
Cromwell v. County of Sac, 94 U. S., 351;
Aurora City v. West, 7 Wall., 102.

In Southern Pac. Railroad v. U. S., this Court said, at page 52:

> "In view of these adjudications, it would seem that the controlling inquiry is whether, under the pleadings in the former cases, the sufficiency of the Atlantic and Pacific maps of 1872 as maps of definite location, was a matter *in issue* and *determined, as between* the United States and the Southern Pacific Railroad Company." (Italics petitioner's.)

And in Cromwell v. County of Sac, at page 353:

> "But where the second action between the same parties is upon a different claim or demand, the judgment

in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

6. The Court of Appeals also failed to follow the principle of its own decision in the case of Capital Traction Co. v. Vawter, 37 App. D. C., 29, also called to its attention, in which it said that in actions *ex delicto* where there are co-defendants, the right to indemnity is preserved by the dismissal of one defendant from the case at the completion of the plaintiff's evidence.

7. The contract of the Otis Company **to do this work** and the further fact in evidence that, at the time of the accident, it was **doing other independent work** through its servant, Locke, the operator, namely, was carrying tenants of the building as passengers for the owner of the building were established by the verdict and judgment; but the Court of Appeals wholly ignored the facts so established and, for itself, decided the questions of fact.

The court said:

"This case turns upon the scope of the contract between the Otis Company and the Fuller Company for the use by the latter of the elevator and the operator Locke.

* * * * * * * * *

"The evidence touching the agreement between the Otis Company and the Fuller Company relative to the use of the car is substantially the same as in the prior case. * * * In the present case, a studious attempt has been made on the part of the Fuller Company to qualify the evidence given by its employees in the prior case by asserting that it contracted with the Otis Company for 'elevator service,' instead of for the hiring of the car, equipment and operator outright. * * *

"We now come to the crucial issue in both cases, whose servant was Locke, the operator, at the time the

accident occurred? **Again we are remanded to the former case.**

* * * * * * * * *

"We think, therefore, in view of the adjudicated facts, which were not open to the consideration of a second jury, there was no such primary liability on the part of the Otis Company as will support an action for indemnity.

"Some stress is laid upon the meager testimony to the effect that passengers were occasionally carried on this elevator at and about the time this accident occurred. The only reasonable inference to be drawn from the evidence is that this service was rendered for the accommodation of the owner of the building. It does not appear that it entered into the contract for the use of the elevator. It follows, therefore, that the elevator was not being operated at this time primarily for the carrying of passengers, and incidentally for the completion of the building; but primarily for the completion of the building, and incidentally for the carrying of passengers. In other words, the passengers were carried for the accommodation of the owner of the building, and this was done by whoever happened to be in control of the elevator. The contention is of no importance."

Thus, the court used the testimony in the record of the McCloskey case as independent testimony, although it was introduced for no such purpose (R., pp. 25, 26). Furthermore, the opinion incorrectly states that employees of the Fuller Company testified in the prior case that the company contracted with the Otis Company *for the hiring of the car and operator*, and incorrectly states that *the evidence in both cases relative to the agreement was the same*, whereas the evidence before the jury in the instant case is **materially different** and was sufficient to support its verdict. (See comparison of evidence, Brief, pp. 25-30.)

Its decision therefore fails to follow and is in conflict with the long line of decisions of this court, which hold that

the verdict of the jury settles all questions of fact and that the weight, force or degree of the evidence is not open for consideration by the appellate court. The decisions to this effect, which were specifically called to the attention of the court in the manner stated, are:

Smiley v. Kansas, 196 U. S., 447;
Lancaster v. Collins, 115 U. S., 222;
Mobile Ry. Co. v. Jurey, 111 U. S., 584;
Railroad Co. v. Pratt, 22 Wall., 123.

And, in treating the testimony in the record of the McCloskey case as independent testimony of substantive facts and deciding the question of the liability of Otis to Fuller on that record, the Court of Appeals *used that testimony for a distinct and illegal purpose* and its decision in this respect fails to follow the decision of this court in Gas Light Co. v. D. C., *supra,* wherein was said of similar use by the Supreme Court of the District of Columbia (p. 331):

> "The testimony of Smith taken in the first suit was *res inter alios,* and therefore incompetent against the Gas Company as independent testimony. The fact that it was admissable for the purpose of determining the scope of the thing adjudged in the suit in which it was given, did not justify its being used for a distinct and illegal purpose."

8. The decisions of the appellate courts, in affirming the McCloskey judgment, having proceeded upon a materially different state of facts, were not even precedents for the lower court, warranting the determination in the instant case as a matter of law, that the status of the operator, as **between Fuller and Otis,** was the same as it was **between Fuller and Mackay** in the prior case. The judgments in these cases rest on different but not inconsistent grounds. In the prior case on the ground that **as between Fuller and**

Mackay, the operator was in **point of law** the servant of the former, because of the legal conclusion as to the operating of the elevator under the **Fuller-Mackay agreement**; whereas in the instant case, the judgment rests upon the ground that **as between Fuller and Otis** and under the **Fuller-Otis agreement** the operating was done by the Otis Company and in **point of fact** its servant was the cause of the accident.

9. Petitioner states that under Sec. 250 of the Judicial Code, relating to the District of Columbia (36 Stat., p. 1159), the judgment of the Court of Appeals in this case is made final but the same may be reviewed by this Court on certiorari under Sec. 251 of said Code.

10. Petitioner says that the questions involved are important not only to itself but to future litigants and the trial courts, they vitally affecting rights of parties in all cases involving primary and secondary liability.

The decision will affect rights such as contribution and exoneration as well as indemnity to parties who have been compelled by law to pay what in justice and by right should have been paid by the wrongdoers, thus virtually depriving the one of the right to recover contribution or indemnity from the other.

It will also affect a large proportion of litigation, in this jurisdiction, in which questions of *res judicata* and *estoppel* frequently arise, and bar claims or demands which under the decisions of this court are justiciable.

WHEREFORE, the premises considered, your petitioner prays that the writ of certiorari may issue out of and under the hand and seal of this Court, directed to the Court of Appeals of the District of Columbia, requiring it to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Court of Appeals in said cause therein

entitled Otis Elevator Company, a corporation, Appellant, vs. George A. Fuller Company, a corporation, Appellee, and numbered 2829, October Term, 1915, to the end that said cause may be reviewed and determined by this Court, and that the said judgment of the Court of Appeals, in said cause, may be reversed by this honorable Court.

GEORGE A. FULLER COMPANY,
Petitioner.
BY EDWARD S. DUVALL, JR.,
Attorney for Petitioner.

EDWARD S. DUVALL, JR.,
Attorney for Petitioner.

District of Columbia, ss:

Edward S. Duvall, Jr., being duly sworn, on oath says, that he is the attorney for petitioner and has knowledge of the facts contained in the foregoing petition, and that he verily believes the facts stated in said petition to be true.

EDWARD S. DUVALL, JR.

Subscribed and sworn to before me on this 11th day of March, 1916.

M. E. WHEATLEY,
Notary Public, D. C.

BRIEF IN SUPPORT OF PETITION.

1. The Court of Appeals misapplied the decision of this Court in the case of Fuller Company v. McCloskey, 228 U. S., 194, a case out of which the present suit grew.

In that case, McCloskey, a painter, was employed by the Mackay Company which arranged with the Fuller Company for the use of the elevator in painting the shaft and the Fuller Company in turn had an agreement with the Otis Company which actually operated the elevator. This Court, on error (the Otis Company being out of the case), finally decided as a conclusion of law that "the operating of the elevator under this **arrangement with the Mackay Company** was an operating of it by the Fuller Company," *a fortiori*, the operator was in point of law the servant of Fuller and not of Mackay and hence not a fellow-servant of McCloskey's. **The status of the operator, as between Fuller and Mackay, was fixed** without the necessity of determining his real status, as between Fuller and Otis, or determining the nature and legal effect of the agreement between these two, the terms of which were not even before the Court, as will appear from the record in that case.

It would, therefore, appear to be clear that this Court did not decide the question of the legal effect of any contract except the Fuller-Mackay arrangement and did not decide the status of the operator between Fuller and Otis under their arrangement. A decision of this question was unnecessary for the determination of Fuller's liability to McCloskey and the judgment of this Court did not go to that extent. But it does become important in this case in determining the liability of Otis to Fuller for its primary fault.

The Court of Appeals, therefore, misapplied this Court's decision in the former case when it held that it determined the legal effect of the Fuller-Otis contract, as between these

two, to be that *"the Fuller Company hired the use of the elevator and operator"* from the Otis Company, and also determined *"the status of the operator as the servant of the Fuller Company,"* as between Fuller and Otis.

2. The parts of the decision of the Court of Appeals, quoted in the Petition—referring especially to the language indicated by the use of heavier type—hold that there is no *res judicata* between the co-defendants in the McCloskey record and judgment, and particularly that the question of their relative rights and liabilities was not adjudicated in that case and could not have been litigated and determined there, because, as the Court says, "these two defendants were not adversary litigants in the sense that they could try out an issue of liability between themselves in that action," yet it inconsistently holds in conclusion, that in the present action (which is admittedly between parties who were never adversary litigants in the prior case and is upon a different claim or demand), the plaintiff was *estopped* by that judgment from showing what was not in issue in the prior case and is the very basis of the primary liability of the Otis Company, namely, the **agreement** between the two defendants whereby the Otis Company undertook **to do the work** and not to **hire the operator out,** and consequently that the operator, as **a matter of fact** was the servant of the Otis Company at the time of the accident.

The Court's decision in this regard is in conflict with the prnciples of res judicata as announced by the Supreme Court of the United States in the cases of Aurora City v. West, 7 Wall., 102; Cromwell v. County of Sac, 94 U. S., 351; and So. Pac. R. R. Co. v. U. S., 168 U. S., 1; which were specifically brought to the attention of the Court of Appeals, both in the brief filed on behalf of the appellee and on the oral argument of the appeal. Furthermore, the Court misapplied that part of the opinion of this Court, which it

quotes from Cromwell v. County of Sac, and thereby arrived at an erroneous conclusion which vitally affects this case. The Court quoted only a part of a separate and distinct paragraph, omitting the opening sentence thereof, which reads as follows:

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

But the Court of Appeals had already said that the question of liability (which necessarily involved the contract covering the work and the status of the elevator operator **in point of fact**), was not in issue in the McCloskey case and was not adjudicated between the co-defendants. Furthermore, the point controverted in the McCloskey case, upon the determination of which the verdict was rendered, was one solely between that plaintiff and the Fuller Company, after the Otis Company was dismissed from the case, namely, whether **in point of law** the elevator operator should be considered to be the servant of the Fuller Company or of the Mackay Company at the time of the accident, in view of the contract between these two. This point decided between McCloskey and the Fuller Company is wholly different to the point determined in this case between Fuller and Otis, namely, that under the agreement between the Fuller Company and the Otis Company, and as between these two, the operator was **in fact** the servant of the Otis Company at the time of the accident. The one determination is not inconsistent with the other. As this Court said in Cromwell v. County of Sac:

> "Evidence showing that the action of Smith was brought for the sole use and benefit of the present plain-

tiff was, in our judgment, admissable. The finding that Smith was the holder and owner of the coupons in suit went only to this extent, that he held the legal title to them, which was sufficient for the purpose of the action, and was not inconsistent with an equitable and beneficial interest in another."

This Court also said in that case:

"These cases, usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined."

In Southern Pacific Railroad v. U. S., *supra*, this Court, at page 52, said:

"In view of these adjudications, it would seem that the controlling inquiry is whether, under the pleadings in the former cases, the sufficiency of the Atlantic and Pacific maps of 1872 as maps of definite location, was a matter in issue and determined, *as between* the United States and the Southern Pacific Railroad Company."

(The italics are petitioner's.)

3. The decision of the Court of Appeals, in this respect, is also in conflict with the following decisions of the Supreme Court of the United States in actions to recover indemnity, which were also called to the attention of the Court in appellee's brief and on the oral argument of the appeal:

Chicago v. Robbins, 2 Black, 418;
Robbins v. Chicago, 4 Wall., 657; and
Gas Light Co. v. D. C., 161 U. S., 316.

In the latter case this Court said (p. 333):

> "It is true that in Chicago City v. Robbins, ub. sup., in speaking of the conclusiveness of the judgment rendered against the city, the Court said (p. 423): 'Robbins is not, however, estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault the accident happened.' * * * therefore the essential fact on which the judgment against the city rested did not as a legal consequence imply negligence on the part of Robbins. Here, of course, a different state of fact gives rise to a different legal result."

In the case at bar, the Otis Company was not estopped, by the judgment in the McCloskey case, from showing that it was under no obligation to the Fuller Company to operate the elevator in question, and that it was not through its fault the accident happened. If the Otis Company was not estopped in this regard neither can it be said that the Fuller Company was. The estoppel must be mutual. Unless it binds both parties, neither is bound.

4. The decision of the Court of Appeals, in the respect mentioned, also fails to follow the general rule laid down in indemnity cases by Federal and State Courts of last resort and is in conflict with decisions of such courts specifically called to its attention, in the manner heretofore stated, some of which decisions had been quoted with approval by this Court in Gas Light Co. v. D. C., supra.

The cases to which your petitioner refers are:

Owensboro v. Westinghouse Co., 91 C. C. A., 335;
Pullman Co. v. Cincinnati, etc., R. R. Co., 147 Ky. (Ct. of Appeals), 498;
Rubovits v. Trego, 178 Ill. App., 127;
Oceanic Co. v. Comp. Trans. Espanola, 134 N. Y., 461;

Lowell v. Boston & L. R. R. Corp., 23 Pick., 24;
Churchill v. Holt, 127 Mass., 165;
King v. Chase, 15 N. H., 9; and
O'Conner vs. N. Y. Im. Co., 28 N. Y. Supp., 544.
See also Westfield G. Co. v. Noblesville Co., 13 Ind. App., 481.

The facts of the case of Owensboro v. Westinghouse Co., *supra*, were these:

Suit was brought by an administrator against both the city and the company, alleging their joint occupation of the electrical system in the city and their joint negligence. Each defendant filed a separate answer, each denied that they had jointly occupied, and each insisted that the other was in the occupation, and, further, each denied that there had been negligence on its part. The case was tried before a jury, which rendered a verdict against the city alone. A judgment was rendered against the city, and another judgment was rendered in favor of the company and for its costs. This judgment was later affirmed. The company refused to pay the judgment, and the city brought its action. It was tried in the Circuit Court of the United States before a jury, and, as the Circuit Court of Appeals said, under instructions which seem to have left narrow room for the jury, a verdict was rendered for the company.

The court, composed of Judge Lurton (later an Associate Justice of the Supreme Court of the United States) and Judges Severens and Richards, in passing on the appeal taken in the case, said:

> "Conflicting claims are made by the parties in respect to the effect of the judgment in the York case against the city. Ingenious arguments are made that estoppels were thereby founded in respect to several of the issues pending in this case. But laying aside for the moment the consideration of the effect of the so-called compromise agreement of November 6, 1901,

and what was done in the York case in pursuance of it, we think nothing in the nature of an estoppel in respect to any question now pending between these parties exists in that record. It is true these parties were joined as defendants. But they appeared by different attorneys, made separate answers and defenses; there were, in effect, different verdicts and separate judgments. There was no cross-pleading, nor were any issues made between these parties, nor was anything adjudged as betwixt them, even if such proceeding were permissible under the laws of Kentucky. Neither defendant had any control over the pleading or defense made by the other, and neither could take up for review an adverse judgment against the other. To all intents and purposes, the conditions were the same as if independent suits had been brought against each of the defendants. The record and judgment in that case would be *prima facie* evidence that a judgment had been rendered against the city, and for what amount on a cause of action which it claims arose from the primary fault of the company; but the question of its arising from the fault of the company would of course still be open, or, if the company could show that the city had not made defense in good faith, that would probably rebut the *prima facie* effect of the former judgment. 1 Wharton on Evidence, Par. 820, and the numerous cases there cited; 2 Black on Judgments (2d Ed.), Par. 604. It must have been anticipated by the company that, if it performed its contract in a careless and negligent manner, the city would be exposed to recoveries for damages in consequence thereof for injuries after the city would have taken possession. If the city made all the defense it could, it had performed its whole duty to the company, and the judgment was a proximate consequence of the fault of the company, the city itself being without fault.

* * * * * * * * *

Again, the record in the York case had necessarily been put in evidence to make out the plaintiff's case. The court in its instructions said:

> 'The case in the State court was brought both against the city and this defendant, and the judge who tried that case instructed the jury as counsel has pointed out to you, and the jury found a verdict upon those issues and instructions to the effect that the city of Owensboro alone was responsible for the damages in that suit. While I have held that that was not a bar to the action, the evidence, without objection, has been introduced in this case. You may attach such importance to that evidence as you think it is entitled to.'

This was not, in our opinion, justifiable. The record of the former case was brought into the case for no such purpose, and the evidence, the instructions of the court, and the verdict of the jury were not competent to be considered and given such importance as the jury might think them entitled to. The court developed the fact that the jury in the former case had found that the city of Owensboro alone was responsible for the damages in that suit. Quite naturally the jury would have said to themselves. 'This question has been already determined. True the court says we are not bound by it, but it would not be proper for us to say that the jury was wrong, and decide it the other way.' If a witness who had heard the trial had been called and his opinion asked as to what the verdict should be, his answer could not be more harmful than this reference to the result in the former action. * * * The judgment should be reversed with costs and a new trial awarded."

In the case of Oceanic Co. v. Comp. Trans. Espanola, *supra*, quoted with approval by this court in the Gas Light Co. v. D. C. case, the court said:

> "The defendant in the action would not be bound by the judgment as a party, for he was not a defendant in the first action; but had he been joined as a defendant

and both had been adjudged liable, the judgment would not necessarily have determined, as between them, whether either was or was not primarily liable, because that question could not have been litigated in the first action, at least it could not have been without the consent of all the parties to it, and of the trial court, and then only through the aid of a special verdict or of a special finding. The judgment in an action first brought is proof in the second action of the liability, and the amount thereof, of the defendant in the first action, to the plaintiff therein. The liability of the defendant in the second action to the defendant in the first (the plaintiff in the second) must be established by evidence outside of the record of the first action. * * * In the case at bar, the judgment of the circuit court is not conclusive evidence of the liability of the defendant to the plaintiff, nor would it have been, had both been defendants in that judgment. But until it is impeached as fraudulent, or as rendered by a court without jurisdiction, it is proof that the plaintiff in this action was legally liable to Cleary for the damages occasioned by the accident, and of the amount of that liability. When we give the judgment of the circuit court that effect, we give it the same force and effect as we give to a judgment of our own courts. When the plaintiff had shown that he gave due notice of the pendency of the first action, that he had contested it so far as he could, and had finally paid the judgment rendered, he had shown the amount of the damages which he had sustained, aside from the expenses incurred in its defense. Whether, *as between* these litigants, the defendant is primarily liable for the damages occasioned by the injury to Cleary must be determined by evidence outside of the record in the United States Circuit Court."

In the case of Churchill v. Holt, 127 Mass., 165, which is also quoted with approval by this court in Gas Light Co. v. D. C., the court said:

"As lessees and occupants of the building, it was their duty, as between themselves and the public, to keep the hatchway in such proper and safe condition that travelers on the street would not be injured. If they neglected this duty they would be liable, although the unsafe condition was caused by a stranger, and although they did not know it. Their liability depended upon the question whether the hatchway was dangerous to travelers under such circumstances that the occupant of the building was responsible for the injury suffered, and not upon the question as to who negligently did the act which created the danger. If the defendants, or a servant in the prosecution of their business, negligently uncovered the hatchway and allowed it to remain unguarded, without the knowledge of the plaintiffs, whereby the plaintiffs from their relation to the building were made liable to the person injured, the rule as to joint tort feasors does not apply, but the plaintiff can maintain this action.

The ground taken by the defendants, that the judgment in the suit by Meston against the plaintiffs is conclusive against the right to maintain this action, can not be sustained.

Under the pleadings in that suit the judgment may have been rendered upon the ground that the plaintiffs were liable as occupants of the building, without any regard to the question whether they or a stranger to the suit removed the cover, or negligently left it unguarded. It conclusively shows that they were guilty of negligence in law as to the person injured, but it does not show that they were *participes criminis* with the defendants, and is not inconsistent with their right to maintain this action."

Under the pleadings in the McCloskey suit the judgment rests upon the ground, as stated by this court, that the operating of the elevator under the arrangement with the Mackay Company was an operating of it by the Fuller Company, and that it owed a legal duty to McCloskey of oper-

ating with proper care. That ground for the judgment, being an omission of a legal duty, is independent of the question whether the Fuller Company, or the Otis Company was negligent in fact, and does not decide this point.

In the case of Rubovits v. Trego, 178 Ill. App., 127, which was an action to recover indemnity, the court said:

> "In all that class of cases where one party owes a legal duty to the public and to third persons to keep a place or an instrumentality reasonably safe, whenever another, by contract, agrees to perform that duty for him upon sufficient consideration, such contract by implication of law becomes one of indemnity and renders the party assuming such duty by contract liable for all damages that may legally be recovered by third persons against such party upon whom the law had in the first instance cast such duty, as a result of the failure to comply with such contract.
>
> The right of appellee to recover is not affected by the general doctrine that neither contribution nor indemnity will be given to one of several tort feasors against the others. The liability of appellant is primary, because of his contract to assume the duty of appellee."

In the instant case the Court of Appeals said that *"the Otis Company might have indemnified the Fuller Company against the very thing that happened, which would be determinative of this case,"* and in the above case which was also specifically called to the attention of the court, the Court of Appeals of Illinois said such a contract as the Fuller Company had with the Otis Company became by implication of law one of indemnity.

In the case of Lowell v. Boston & Lowell R. R. Cor., *supra,* which was quoted with approval by this court in the Gas Light Co. v. D. C. case, the court said:

"Unless, therefore, the plaintiffs are estopped by some inflexible principle of law, they are entitled to indemnity, so far as they have suffered a loss by the default of the defendants' servants; and holding as we do, for the reasons stated, that they are not so estopped, we are of opinion, that they are entitled to recover."

5. The Court of Appeals, in thus deciding the question, also failed to follow its own decision in the case of Capital Traction Co. v. Vawter, 37 App. D. C., 29, wherein it said:

"We think that, while it is a matter largely of discretion in the trial court, consideration should be given before directing a verdict at the close of the evidence offered by plaintiff, to the probable effect upon the remaining co-defendant. If the action is one *ex contractu*, it is clear that the course here pursued might operate to enlarge the liability of the remaining defendants by depriving them of the right to enforce contribution in the event of a judgment against all. On the other hand, no reason is apparent for applying this principle to the case at bar. The action is *ex delicto*, and the defendants, had a joint judgment been rendered against them, would have been in the situation of joint tort feasors, with no right of action for contribution against each other. It is difficult to understand how appellant can be injured by the ruling. Its liability has not been increased."

6. Counsel also submits to the Court that the evidence touching the agreement between the Otis Company and the Fuller Company relative to the use of the elevator is not "substantially the same as in the prior case," as stated in the opinion of the Court of Appeals, the material difference being clearly shown here by paralleling the evidence in both cases which has any bearing on the question.

McCLOSKEY CASE.

(The record in this case is set out in pp. 27 to 102 inclusive of the record in the Fuller-Otis Case.)

Ramsey W. Scott, the local manager for the Otis Elevator Company, a witness for the plaintiff, testified that he knew that the Otis Company, a defendant in this case was furnishing a man for the running of an elevator in the Hibbs Building but under what arrangement he did not know, as any such arrangement was verbal and very likely made between the Otis foreman in charge of the work at the Hibbs Building and a representative of the Fuller Company; that he did not make the arrangement himself; that this operator was paid by the Otis Company and **that the Fuller Company was charged $3 a day, by the Otis Company for the running of the car** by this man and the bills were paid by the Fuller Company. (R., pp. 46-47.)

On cross-examination by counsel for the Fuller Company, the witness stated **that the Otis Company charged the Fuller Company $3 a**

FULLER-OTIS CASE.

(The evidence in this case is to be found in pp. 1-27 of the record.)

James Baird, a witness for the Fuller Company, plaintiff, testified that he was vice-president of the Fuller Company and manager of the company when it constructed the Hibbs Building; that the company's hod-lifts were taken down in June or July and after that there was need for **elevator service** inside the building for finishing up, including the painting of the shafts and the only elevators in there were those belonging to the Otis Company; that during July and August the **plaintiff employed the Otis Company to give them elevator service** in winding up the odds and ends on the building; the defendant supplied the elevator service for the different mechanics who were working throughout the building at that time to take up small amounts of plaster, tiles or woodwork, or **in this particular case to allow the Mackay Company to paint the shaft, using the elevator as a traveling platform,** and

day and double pay for overtime, which was for the service in running the elevator and looking after the machinery and that the elevator operator was carried on the time books of the Otis Company (R., p. 47); that he knew to what use the elevators were being put by the painters for their work (R., p. 58); that all that the Fuller Company had to do with the elevator and the operator was to tell the operator what floors to go to, when to stop, what to carry up, and to say how long they wanted him (R., pp. 59-60); that the arrangement which he understood existed between his company and the Fuller Company related merely to the use of a temporary hoist for building materials and not for the **services of a passenger elevator** (R., pp. 52-53) and thereupon the bill for this service was offered in evidence and is couched in the following language (R., p. 50):

Philadelphia,
August 14, 1907.

Geo. A. Fuller Company,
"Hibbs Building."

To Otis Elevator Company, Dr.

One man to take care of for miscellaneous service that is given by an elevator at that stage of the building, universally; **that they had always employed the Otis Company to do similar work before** this occasion where the latter supplied the elevators for the building; **that they had previously similarly employed the Otis Company on other buildings in this city,** namely, in the Munsey and Union Trust buildings, where it installed the elevators; in those buildings the Otis Company supplied the Fuller Company with a temporary service at the finishing stage for the odds and ends; wherever the Otis Company installed elevator service on jobs, they furnished temporary service to the Fuller Company for such purposes; the Otis Company furnished everything, the elevator, the man, the oil and grease and kept the machine in order and then rendered a bill covering the whole expense of running it, and as a part of the bill for this service, they included the expenses of repairs; **the service included everything;** the cost of this service was indefinite because one could not tell what the various items of charge

elevator and operate same during month of July:

* * * * *

One man to take care of elevator and operate same from Aug. 1st to 15th.

* * * * *

$150.72

Report of Time on Hibbs Building (July).

* * * * hrs.

Report of time on Hibbs Building (August).

* * * * hrs.

Francis J. Fisher, a witness for the defendant, the Fuller Company, testified that he was employed by the defendant to superintend the work of finishing up the Hibbs Building, beginning about three months before the accident to McCloskey; **that the elevator operator who caused the accident was not in the employ of the Fuller Company** (R., p. 70); and that he did not make any arrangement with anyone of the Otis Company relative to the elevator and the operators (R., p. 71), and never made any contracts (R., p. 73). might be until the service was finished (R., p. 11); that **there was no written contract between the Fuller Company and the Otis Company covering this work** they were to do and **no special agreement, nothing other than their customary arrangement** (R., p. 12), and **the Otis Company supplied the elevator service for the painting of the elevator shaft in the Munsey and Union Trust buildings** (R., p. 11); that for this work—this service—at the Hibbs building the Fuller Company received a bill for the wages of the man, fuses and grease and miscellaneous items that went into the cost of service; **that they employed the Otis Company to do this work instead of doing it themselves because this work was in the Otis Company's line and not in the plaintiff's**; that the operator did not work for the Fuller Company because he would have known about it if he had; **that they never employed that character of mechanics**; that so far as his recollection goes or their records show no word passed between the Fuller Company and any representative of the Otis Company as to this particular arrangement in the

P. F. Gormley, a witness for defendant, the Fuller Company, testified that he was the general superintendent for the defendant, having charge of all work in this city, including the Hibbs Building; that he did not make any arrangement with the Otis Company relative to the elevators in this building and did not know anything about the arrangement that existed between the two companies (R., pp. 74-75).

James Baird, a witness for defendant, the Fuller Company, testified that he was the manager for defendant and the work of constructing the Hibbs Building was under his control (R., p. 75); that he did not recall any arrangement with the Otis Company for the use of the elevator; that it is customary for the builder to use the car for the benefit of all desiring it; that **he did not think there was any special arrangement made and that he was the only one to make any such arrangement** (R., p. 78).

Hibbs Building for this elevator, it just went on the customary arrangement; the Fuller Company never bought any of the accessories mentioned nor anything in connection with the elevator; that when the Fuller Company secured the elevator service from the Otis Company they had no idea how much was involved and it was the general custom to supply the same service to the sub-contractors as they come and call for it (R., p. 12); that Fisher, the superintendent in charge of the finishing work at the Hibbs Building, had no authority to direct or control employees of any sub-contractors including the Otis Company, except to show them what work was to be done (R., p. 13).

On cross-examination, the Otis Company introduced in evidence the bill for this service (R., p. 13) and the witness testified that he assumed that the Otis Company was giving them the elevator service for the completion of the building, and the Mackay Company asked for it and he gave it to them, that he turned the service over to them, it included everything, complete

service; **the Fuller Company did not hire the operator from the Otis Company** (R., pp. 15-16); that **the bill from the Otis Company for the service** came to his desk with many others, approved for payment by the cashier and accompanied by the checks and if the bills are O. K.'d when he is asked to sign the checks, **he merely looked for the O. K.'s and that he did not pay any attention to the language in which the Otis Company's bill** (R., p. 13) **was couched** or the way in which the charge was made, when he signed the check in payment; (R., p. 17); that the superintendent, Fisher, whenever he wanted the service, simply notified the Otis Company to give it without any direct contract (R., p. 17).

Witness Francis J. Fisher, for the defendant, testified that he thinks he notified the Otis Company that the elevator service was needed by the painters in the Hibbs Building (R., p. 18); that the representative of the Otis Company was around constantly and had complete charge of the elevators while operated to assist the painters (R., p. 19); that he did not make any arrangement

> with the Otis Company for this elevator service, all he did was to notify them when he wanted it (R., p. 20).
>
> On redirect, the witness testified that the Otis Company was supplying general service for the finishing of the Hibbs Building, besides the service for the painters (R., p. 21).

The foregoing comparison of the evidence brings out a material difference in this very important particular, namely, that in the McCloskey case there was no evidence of the **Fuller-Otis contract**—only the **incidents** of the operator's employment were in evidence; whereas in the instant case, **the contract** between the Fuller Company and the Otis Company, for the **elevator service supplied to the painters,** is adduced, in addition to similar evidence of the incidents of the operator's employment. And presumably this view of the evidence was taken by the court on the oral argument of the appeal as indicated to counsel by the query of the learned justice who wrote the opinion, why it was that the evidence showing the nature of the Fuller-Otis agreement had not been introduced by the Fuller Company in the McCloskey case. It was explained, and satisfactorily, so it was thought at the time, that it was deemed inadmissable to defeat McCloskey's claim, yet it is admissable in this suit against the Otis Company, under the authority of Cromwell v. County of Sac, 94 U. S., 351, and is material as establishing the primary liability of that company.

In Cromwell v. County of Sac, this court said, at page 358:

> "There is nothing in this language, applied to the facts of the case, which gives support to the doctrine

> that, whenever in one action a party might have brought forward a particular ground of recovery or defense, and neglected to do so, he is, in a subsequent suit between the same parties upon a different cause of action, precluded from availing himself of such ground."

The Mackay Company's agreement and the mere **incidents** of the elevator operator's employment resulted in a determination or adjudication in the suit between McCloskey and the Fuller Company, that as between those two, the operator, as **matter of law,** was the servant of the latter, but, when these same **incidents,** which also appear in the instant suit, are viewed in the light of the **additional evidence showing the contract between the Fuller Company and the Otis Company** (the employer of that operator), they necessarily lead to a different but not inconsistent determination, that is, the adjudication, that as between these two litigants, where the right to indemnity alone is involvel, the operator as **matter of fact** was the servant of the Otis Company, because it is established by the verdict of the jury that the Otis Company undertook to **do the work** of assisting the painters in the shaft. Standard Oil Co. v. Anderson, 212 U. S., 215.

7. **Nor can it even be said, with reason, in view of the material difference between the facts, as shown, that the decision of this court in the McCloskey case (that, as between the Fuller Company and the Mackay Company, the operator was the servant of the former), is a precedent as to the operator's status which should have controlled the trial judge and have required him to instruct the jury as matter of law, that, as between the present litigants, the status of the operator was the same as in the McCloskey case.** Nor was it a precedent for the Court of Appeals, to justify it in disregarding the verdict of the jury and deciding the point

between these parties as one of law. Upon the state of the evidence here shown, the trial judge correctly construed the decision of this court, and properly submitted the facts to the jury for a finding.

8. The Court of Appeals failed to follow the decisions of this Court, and did not treat the Fuller-Otis contract as though established by the verdict and judgment in the case at bar, but did review the weight, force and degree of the evidence upon which the verdict was rendered and decided the questions of fact contrary to the verdict and judgment.

The attention of the court was directed to the following decisions of the Supreme Court of the United States, both in the brief for the appellee (the Fuller Company), and on the oral argument, which state that the verdict of the jury settles all questions of fact and that if there is competent evidence of such contract put before the jury, the weight, force or degree of such evidence is not open for consideration by the appellate court:

> Railroad Co. v. Pratt, 22 Wall., 123;
> Mobile Ry. Co. v. Jurey, 111 U. S., 584;
> Lancaster v. Collins, 115 U. S., 222;
> Smiley v. Kansas, 196 U. S., 447.

In Railroad Co. v. Pratt, *supra,* this court said at page 131:

> "The weight, the force, or the degree of the evidence is not before us, if there was competent evidence, on which the jury might lawfully find the existence of the contract alleged.
>
> Both the authority of Graves, the station agent, to make the contract, and the evidence of Pratt and others of the making of the contract, were questions of fact for the consideration of the jury. If the jury have found in the plaintiffs' favor on these points,

upon evidence legally sufficient to justify it, this court can not interfere with their findings."

In Lancaster v. Collins, *supra,* this court said:

"The question of the existence of such an agreement by Lancaster personally was fairly put to the jury in the charge of the court. There was conflicting evidence in regard to it. This court can not review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered."

And in Smiley v. Kansas, *supra,* this court said:

"The verdict of the jury settles all questions of fact."

However, the lower court in this case said:

"This case turns upon the scope of the contract between the Otis Company and the Fuller Company for the use by the latter of the elevator and the operator Locke.

The evidence touching the agreement between the Otis Company and the Fuller Company * * * is substantially the same as in the prior case. * * *

In the present case, a studious attempt has been made on the part of the Fuller Company to qualify the evidence given by its employees in the prior case by asserting that it contracted with the Otis Company for 'elevator service,' instead of for the hiring of the car, equipment and operator outright. If this were now an open question, the nature of the contract would have to be determined from the facts, and not from any characterization which the Fuller Company might choose to place upon it."

* * * * * * * * *

With this criticism, the court eliminated the evidence as to the Fuller-Otis contract in the record of the instant case and, referring to the testimony of witnesses in the record of the McCloskey suit as proof of substantive facts, for itself, decided the question whether, as between these parties, the operator may be considered to be the servant of the Fuller Company, the language of the opinion of the Court of Appeals in this respect being as follows:

> "We now come to the crucial issue in both cases, whose servant was Locke, the operator, at the time the accident occurred. Again we are remanded to the former case.
> * * * * * * * * *
> With the status of Locke fixed in the prior case as the servant of the Fuller Company. * * *
> * * * * * * * * *
> It having been settled that the Otis Company turned over the elevator and the operator to be used by the Fuller Company." * * *

It will be noted by reference to the evidence of Scott. manager for the Otis Company, a volunteer witness in the prior suit for the plaintiff and against the Fuller Company, that he testified on cross-examination that "the Otis Company charged the Fuller Company for **the service** in running the elevator" (R., p. 47), and by reference to the evidence of employees of the Fuller Company that they positively denied the **hiring of the car, equipment and operator outright.**

This evidence comports with the contract between Fuller and Otis in evidence in the instant suit, and it would appear, therefore, that the lower court's criticism of the weight and force of the evidence, in the instant case, relating to the Fuller-Otis contract, was not warranted by the records in the two cases.

In the record of this case, the **only** evidence before the court upon which might be based a contention that the Otis Company had hired its operator out instead of contracting itself to do the work for the painters, was the bill introduced in evidence by the defendant on cross-examination of witness Baird (R., p. 15) and any inference to be drawn therefrom in conflict with Baird's testimony concerning the contract between the Fuller Company and the Otis Company. This question was settled by the verdict of the jury.

It was also established by the verdict of the jury that the Otis Elevator Company was operating its elevator upon its own responsibility for the carriage of passengers for hire at the time of the accident as well before as after and that they were actually carrying passengers when the accident happened, and this without any permission from the Fuller Company (R., pp. 2-20-21).

The evidence upon which the jury found these facts is as follows:

> "There were tenants in the Hibbs Building prior to the date of the accident, their offices being up on the 8th or 9th floors (R., p. 20); the Otis Company, while working for the Fuller Company, was not supposed to carry any passengers in the elevator. The Otis Company was carrying up passengers in the elevator, at the time of the accident, and without permission from the Fuller Company" (R., p. 21).

The Court of Appeals reviewed the force of this evidence in the following part of its opinion, and decided the point contrary to the finding of the jury:

> "Some stress is laid upon the meager testimony to the effect that passengers were occasionally carried on this elevator at and about the time this accident oc-

curred. The only reasonable inference to be drawn from the evidence is that this service was rendered for the accommodation of the owner of the building. It does not appear that it entered into the contract for the use of the elevator. It follows, therefore, that the elevator was not being operated at this time primarily for the carrying of passengers, and incidentally for the completion of the building; but primarily for the completion of the building, and incidentally for the carrying of passengers. In other words, the passengers were carried for the accommodation of the owner of the building, and this was done by whoever happened to be in control of the elevator. The contention is of no importance."

The fact established by the verdict of the jury was an important one, having a bearing on the question of *whose work* the Otis Company was doing while McCloskey was on top the elevator as showing that it was also doing other work for itself at the time of the accident.

9. In disregarding the verdict of the jury and deciding this question on the testimony in the record of the McCloskey suit as one of law, the Court of Appeals also failed to follow this Court's decision in the case of Gas Light Co. v. D. C., supra, as to its incompetency as independent testimony to establish a substantive fact, which decision, as heretofore stated, was called to the attention of the lower court in the brief and on the oral argument, and in such respect the decision is in conflict with this Court's said decision.

In Gas Light Co. v. D. C., where a similar use of such testimony was made by the D. C. Supreme Court, this court said, at page 331:

"The testimony of Smith taken in the first suit was *res inter alios,* and therefore incompetent against the Gas Company as independent testimony. The fact that it was admissible for the purpose of determining the

scope of the thing adjudged in the suit in which it was given, did not justify its being used for a distinct and illegal purpose."

By reference to the record in the instant case, page 25, it will be seen that so much of the record in the McCloskey case as was necessary to prove the damages sustained, was introduced in evidence by the plaintiff and the rest of the record was introduced by the defendant (R., p. 26) to show what facts had been adjudicated, but not by either party as independent testimony of substantive facts.

It is submitted in conclusion that the decision of the Court of Appeals is in conflict with the decisions of the Supreme Court of the United States and of the various Federal and State courts herein referred to, which establish elsewhere throughout the Union the right to recover indemnity from a party primarily liable, and said decision virtually denies the said right in the District of Columbia.

Furthermore, in holding that a judgment at law against one of two co-defendants, not adversary litigants, though found not to be *res judicata* as to the matter in issue between them in a subsequent suit on a different claim or demand, nevertheless it operates as an estoppel, this decision establishes a principle of *res judicata* and *estoppel* for the District of Columbia, differing radically from the principle announced by the Supreme Court of the United States in Cromwell v. County of Sac and by the courts throughout the rest of the Union, both Federal and State. It has been the uniform practice of the trial courts of the District of Columbia, since Cromwell v. County of Sac, to follow the principles there laid down, but if the decision in this case is to stand unreversed, it will be in conflict with and constitute a departure from those principles which must necessarily guide and control the trial courts of the District of Columbia henceforth, even to the exclusion of those principles.

It therefore becomes and is an important question for petitioner and for future litigants and the trial courts, vitally affecting rights of parties in all cases involving primary and secondary liability.

For the foregoing considerations it is respectfully submitted that the petition for writ of certiorari should be granted and the case certified to this court for review upon the whole record.

Respectfully,

EDWARD S. DUVALL, JR.,
Attorney for Petitioner.

To

MESSRS. MCKENNEY & FLANNERY,
Attorneys for Respondent.

GENTLEMEN:

Please take notice that the petitioner will submit the foregoing petition for certiorari and a copy of the whole record in the case to the Supreme Court of the United States, at Washington, District of Columbia, upon the convening of the court on Monday, the 3d day of April, 1916, or as soon thereafter as counsel can be heard; a copy of the petition and authorities in support thereof being delivered to you herewith.

EDWARD S. DUVALL, JR.,
Attorney for Petitioner.

Service of the foregoing notice, together with copy of the petition for writ of certiorari (and Exhibit-Brief) and authorities in support thereof, on this 11th day of March, 1916, is hereby acknowledged.

F. D. MCKENNEY,
J. S. FLANNERY,
Attorneys for Respondent.

SUBJECT INDEX.

List of Cases Cited.

IN THE

Court of Appeals, District of Columbia

OCTOBER TERM, 1915.

No. 2829.

OTIS ELEVATOR COMPANY, a Corporation, *Appellant*,

vs.

GEORGE A. FULLER COMPANY, a Corporation.

BRIEF FOR APPELLEE.

I.

STATEMENT OF FACTS.

In 1907 the Hibbs Building in this city was in course of completion. The Fuller Company was the contractor for the erection, the Robert Mackay Company was doing the painting work under a sub-contract with the Fuller Company, and the Otis Company had installed the elevators under a contract with Hibbs and was operating them with its own employees. The Fuller Company employed the Otis

Company to operate and run the elevators for the Mackay Company while the latter's painters were working in the elevator shafts. On August 9, 1907, one of Mackay's painters, McCloskey, while at work on top of the Otis Company's elevator, was injured through the negligence of the Otis operator. Afterwards he brought suit against both the Fuller Company and the Otis Company alleging the foregoing facts and obtained a recovery of $5,425.00 against the Fuller Company, the Otis Company being dismissed at the end of the plaintiff's case in chief.

The judgment against the Fuller Company was affirmed on appeal (35 App., D. C., 595; 228 U. S., 194), and was paid.

This suit was then brought by the Fuller Company against the Otis Company, claiming what is commonly termed as indemnity or reimbursement for the money which by the negligence of the Otis Company it was caused to expend in satisfaction of the judgment recovered by McCloskey. One of the defenses pleaded was this judgment as a bar. Upon trial, a verdict was had and judgment rendered in the Supreme Court of the District of Columbia in favor of the Fuller Company for $6,837.95. From that judgment the Otis Company now appeals.

In the case at bar it was proved at the trial, and the jury so found, that the Otis Company and the Fuller Company were defendants in the negligence suit brought by McCloskey; that after the directed verdict in favor of the Otis Company, at the close of the plaintiff's evidence in chief in that case, the Otis Company and its attorneys withdrew from the case and failed to defend the suit as continued against the Fuller Company; that a verdict and judgment for $5,425.00 was rendered against the Fuller Company; that successive appeals were taken to this court and the Supreme Court of the United States, where the judgment was

affirmed; that said judgment, costs and accrued interest, amounting to $6,628.60, were paid by the Fuller Company to McCloskey to satisfy the said judgment; the occurrence of the accident to McCloskey was shown and that the cause of the accident was the negligence of the elevator operator, an employee of the Otis Company; evidence was adduced tending to prove that at the time of the accident the Otis Company was operating the elevator which caused the accident, under an agreement to supply the elevator service to the Fuller Company and to all others lawfully on the premises, and that it was understood by the Otis Company, from a long course of business dealings of this character, that it was to supply such service for the purposes of the sub-contractor for painting (Mackay Company) when it became necessary to paint the inside of the elevator shafts of the building where the accident occurred, and that it was to operate the elevator as a movable platform for Mackay's painters in the doing of this painting work; that at the time of the accident the Otis Company was doing other work of its own, namely, was carrying passengers in the elevator in question upon its own responsibility; that the Fuller Company and its employees had nothing to do with the operation of the elevator or elevators by the Otis Company; never assumed any more supervision or control over the Otis Company's operator than a person in a public elevator by invitation; that the only supervision authorized or exercised was to see that the Otis Company carried out its agreement for supplying the elevator service when needed; that the elevator in question was at the time of the accident in the absolute custody and control of the Otis Company; that the Fuller Company employed the Otis Company to do this work instead of doing it themselves because this work was in the Otis Company's line and not in the Fuller Company's and the Fuller Company never employed mechanics

such as elevator operators in its building business; and evidence was adduced tending to prove that it was not contemplated by the agreement with the Otis Company that the Fuller Company was to hire the elevator or hire the Otis Company's operator, and evidence was adduced tending to prove that the invoice offered in evidence by the Otis Company in the case at bar (Record, page 13) did not express the terms of the contract between these two parties; it was conceded by counsel for the Otis Company that the operator was its employee, that it paid the operator's wages and that the Fuller Company had no power to discharge or remove him; it was further shown that the Otis Company was notified at its office in this city, from time to time, when the elevator service was required for the painting or other work in the building in question.

Much of this evidence was not before the court in the McCloskey suit, particularly the evidence as to the contractual relations between the two defendants in that case. The evidence upon this point in the case at bar tended to prove that the Otis Company was not a stranger, in fact, to the arrangement with the Mackay Company (painter subcontractor). To controvert this evidence the Otis Company introduced the invoice in evidence and relied on this to sustain its contention that the terms of the contract were expressed therein. The jury by its verdict found against the Otis Company on this point. The Otis Company produced no affirmative evidence of the parol agreement between it and the Fuller Company and its failure to do so justifies the inference that any evidence within its control on this point was unfavorable to it.

The verdict and judgment in the case at bar were upon a state of facts materially different to that in the McCloskey case. While the Fuller Company was shown to be negligent in law in the McCloskey case and therefore liable, the

facts in this case showed that the Otis Company was negligent in fact and therefore primarily liable.

The suggestion in the brief for appellant that the "effect of the judgment rendered herein is to reverse the findings of fact and law in the McCloskey case," is not borne out by a comparison of the evidence in the two cases. Counsel for appellee is confident that the thinly veiled purpose of the suggestion will not appeal to this court.

II.

ARGUMENT.

Points of Law and Authorities.

1. Indemnity.

Right to Recover Indemnity.

In Gas Company vs. D. C., 161 U. S., 316, which is a leading case on the subject of indemnity or recovery over, the Supreme Court, quoting from Lowell vs. Boston & Lowell R. R., 23 Pick., 24, stated the doctrine thus:

> "Our law, however, does not in every case disallow an action, by one wrongdoer against another, to recover damages incurred in consequence of their joint offense. The rule is, *in pari delicto potior est conditio defendentis*. If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offence. In respect to offences, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers."

See also Robbins vs. Chicago, 4 Wall., 657.
Capital Traction Co. vs. Vawter, 37 App., D. C., 29.
Churchill vs. Holt, 127 Mass., 165; 34 Am. Rep., 355.

"The right to indemnity stands upon the principle that every one is responsible for the consequences of his own negligence; and if another person has been compelled (by the judgment of a court of jurisdiction) to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him.
* * * * * * * * *
A party is primarily liable who undertakes to discharge the duty of another party and in doing so is negligent."
Oceanic Co. vs. Comp. Trans. Espanola, 134 N. Y., 461; 30 Am. St. Rep., 685.

"There is, it is true, a general rule that the right of contribution does not exist as between joint tort-feasors; but it applies only between persons who by concert of action intentionally commit the wrong complained of. Where there is no concert of action in the commission of the wrong, the rule does not apply. In such cases the parties are not in *pari delicto* as to each other, and as between themselves their rights may be adjusted in accordance with the principles of law applicable to the relation in fact existing between them. The rule does not apply to torts which are the result of mere negligence."
Mayberry vs. Nor. Pac. Ry. Co., 110 N. W., 356.
See note to Village of Carterville vs. Cook, 16 Am. St. Rep., 255, on rule as to recovery over.
Rule also stated in Anno. Cas., 1913 B, on page 942.

In Rubovits vs. Trego, 178 Ill. App., 127, appellee leased part of building to appellant. Lease provided elevator to be used jointly by all tenants. Also lessees to make all repairs and at their own expense, keep the elevator in good condition and repair. Employee of lessees was injured,

while riding on elevator because of the falling of a water meter attached to the sheave wheel for the purpose of measuring water used in operating elevator. Employee sued appellee and recovered judgment of $4,000.00. Appellee notified lessees to defend suit. Appellee settled judgment for $2,000.00. Also paid $511.28 attorney's fees. Then notified lessees and requested reimbursement. Appellee brought suit against lessees to recover damages sustained by reason of their alleged breach of covenant to keep elevator in good condition and repair at their own expense.

Court directed verdict for plaintiff in $2,511.28 and 5% interest from September 9, 1899, and a verdict for $3,777.00 was returned. Subsequently the court disregarded this verdict and on motion for a new trial the court without a formal remittitur found that the plaintiff was not entitled to interest and entered judgment for $2,511.28.

On appeal "for the error in refusing to submit the case to the jury, the judgment of the court is reversed and the cause remanded."

Court held:

> "In all that class of cases where one party owes a legal duty to the public and to third persons to keep a place or an instrumentality reasonably safe, whenever another, by contract, agrees to perform that duty for him upon sufficient consideration, such contract by implication of law becomes one of indemnity and renders the party assuming such duty by contract liable for all damages that may legally be recovered by third persons against such party upon whom the law had in the first instance cast such duty, as a result of the failure to comply with such contract.
>
> The right of appellee to recover is not affected by the general doctrine that neither contribution nor indemnity will be given to one of several tort feasors against the others. The liability of appellant is primary, because of his contract to assume the duty of

appellee. They are not equally guilty, or, to express it in the language of some of the authorities, they are not in *pari delicto*. City of Brooklyn vs. Brooklyn City R. Co., 47 N. Y., 475, 484, and Wash. G. L. Co. vs. D. C., 161 U. S., 316.

We think also that the court applied the correct rule of measuring the damages recoverable. Where a person is responsible over to another, either by operation of law or by express contract, for whatever may be justly recovered in a suit against such other, and he is duly notified of the pendency of the suit and requested to take upon himself the defense of it, and is given an opportunity to do so, the judgment therein, if obtained without fraud or collusion, will be conclusive in a subsequent suit against him for indemnity, whether he appeared in a former suit or not. 24 Am. & Eng. Encyc. of Law (2 Ed.), 740; Drennan vs. Bunn, 124 Ill., 175.

The appellee was entitled to recover, if at all, for his legal attorneys' fees and costs expended in the defense of the suit against him. Westfield vs. Mayo, 122 Mass., 100; Mayor of Troy vs. Troy & L. R. R. Co., 49 N. Y., 657."

In Old Colony R. R. vs. Slavens, 148 Mass., 363; 12 Am. St. Rep., 558, plaintiff was a common carrier of passengers and carried U. S. mail to and from Boston. Defendant was a contractor to carry mail from station to Boston postoffice. Defendant's employee took mail bags from train and left them on sidewalk or platform in such a manner that Amory, a passenger, fell over them and was injured. Amory brought action against plaintiff for damages and recovered a judgment which plaintiff paid. Plaintiff sued defendant to recover amount of judgment so obtained. Verdict for plaintiff and defendant alleged exceptions.

Court held:

> "We think the plaintiff and defendant, were not, as to each other, in *pari delicto*. The plaintiff was held liable to Amory because bound to keep the sidewalk reasonably safe. But the ground of the present action is, that the defendants by their negligent act exposed the plaintiff to this liability. The plaintiff's neglect to keep the sidewalk safe did not make the plaintiff a joint wrong-doer with the defendants in any such sense as to prevent the plaintiff from recovering."

In Inhabitants of Lowell vs. Boston & Lowell R. R. Corp., 23 Pickering (Mass.), 24; 34 Am. Dec., 33, the declaration stated that plaintiffs were bound to keep a certain highway in repair; that defendants entered on such highway, removed certain barriers, required to prevent travelers from falling into a deep cut, and neglected to replace them; that two persons, owing to the absence of the barriers, fell into the cut and were seriously injured; that such persons commenced actions against plaintiffs and recovered judgment, which, with counsel fees and costs, aggregated upward of eight thousand dollars. The jury gave plaintiffs a verdict for ten thousand dollars in present action.

Court held:

> "It is objected that the defendants are not answerable for the tortious acts of their agents or servants. And this, it is true, if the acts were accompanied by force, for which an action of trespass *vi et armis* would lie, or were willfully done. But the acts complained of were not so done. The defendants' workmen had a right to remove the barriers for a necessary purpose. Their only fault was their neglect in not replacing them at night when they left their work. For this negligence or non-feasance the defendants were clearly answerable."

Notice Required to Bind a Party Primarily Liable.

Express notice to defend is not necessary in order to render a party liable for amount of judgment to injured plaintiff. If party knew that suit was pending and could have defended, etc., he is concluded by the judgment.

Robbins vs. Chicago, 4 Wall., 657.

Cause of Action Accrues When.

Marlette vs. North, etc., Steamboat Co., 13 Daly (N. Y.), 114.
Smith vs. Floran, 43 Conn., 244; 21 Am. Rep., 647.
Oceanic Co. vs. Comp. Trans. Espanola, 134 N. Y., 461; 30 Am. St. Rep., 685.
Georgetown vs. Groff, 124 S. W., 888.
Power vs. Munger, 3 C. C. A., 253.

2. McCloskey Judgment Not a Bar.

The judgment rendered in a negligence suit is not a bar to a suit to recover indemnity, even where the parties were co-defendants in the first suit and judgment was rendered in the first case in favor of the one who is defendant in the second case.

Essentials of Res Judicata and Estoppel Discussed.

"The essential conditions under which the *exception of the res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand, and of the parties in the character in which they are litigants."

Aurora City vs. West, 7 Wall. (U. S.), 102; citing Steam Packet Co. vs. Sickles, 24 How. (U. S.), 341.

In Southern Pacific Railroad vs. United States, 168 U. S., 48, the court said:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue

and directly determined by a court of competent jurisdiction, as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

See Cromwell vs. County of Sac, 94 U. S., 352.

In the case of Pullman Co. vs. Cincinnati, etc., Railroad Co. (Court of Appeals Kentucky, 1912), 147 Ky., 498; 144 S. W., 385, which was a suit by one defendant to recover indemnity from a co-defendant where judgment was recovered against one and paid and in the same suit where recovery was had, the court instructed the jury to return a verdict for the other defendant and *res judicata* was pleaded, with judgment for the plaintiff, the court said on appeal.

"It is insisted for the Pullman Company that the judgment in its favor in the United States Circuit Court when sued by Joel H. Ward is a bar to this action by the railroad company against it to recover the money which Ward recovered from it in that action. But the Pullman Company and the railroad company were not adversaries in that case. Ward controlled the evidence that should be introduced there. If he made out his case there against the railroad company, and did not make out his case against the Pullman Company, this can not affect the rights of the railroad company to recover in this action against the Pullman Company, if it now shows facts sufficient to warrant a recovery; for Ward might have sued the railroad company alone or he might have dismissed his action against the Pullman Company, and in either of these cases the railroad company, if held liable to Ward, might have maintained an action to recover from the Pullman Company. If Ward, instead of dismissing his action, failed to introduce evidence to sustain it, the

result is the same. The railroad company could recover no judgment against the Pullman Company in that case, and its right to recover here is not affected by the fact that Ward failed to recover against the Pullman Company."

In Mills, *et al.*, vs. Cox, *et al.*, 28 Quebec Super. Ct., 375: Plaintiffs aver they are stevedores at Montreal; were engaged in loading a steamship with deals belonging to defendants; four deals fell on one of their men, James Finn, causing his death. Allege that falling of deals arose from faulty construction of pile due to negligence of defendants and employees; that defendants are liable for the damages arising out of the death of Finn. Finn's widow took action against plaintiff and recovered damages in the amount of $3,000 and costs which they allege they have a right to recover back from defendants as the authors of the accident.

Defendants meet this action by three pleas:

1. There is no lien de droit between the parties, etc.
2. They pray acte of the admission and deny generally.
3. Lastly, they say that the widow sued both plaintiffs and defendants claiming $12,000 and costs, issue was joined and case tried by this court, judgment rendered against the present plaintiffs for $3,000 and costs and action dismissed as regards present defendants. Defendants claim that all the elements of *chose jugee* exist and present action should be dismissed.

Defendants at the argument claimed:

> "The important question of law is *chose jugee* and the acquiescence of the present plaintiffs in the original judgment which definitely fixed responsibility on them. All the esesntials necessary for *res judicata are present.*"

Plaintiffs say they are not bound by first judgment be-

cause both parties were defendants in the original judgment, whereas today they appear as plaintiff and defendant respectively. Defendants submit that the pleadings in the first case establish the issues between all parties beyond question.

Held:

> "On the two first pleas there is no *locus standi* for the defendants, in the opinion of this court. As regards the plea of *chose jugee*, the allegation of the defendants that the pleadings in this first case establish the issues between all the parties is negatived by the following statement in the plaintiff's pleas in that case. They allege therein as follows: 'The defendants (the present plaintiffs) deny that there was or is any joint and several liability or responsibility between them and the other defendants (present plaintiffs) in this action, for any loss, damage or injury which the plaintiff (Mrs. Finn) seeks to recover by this action. The defendants now pleading, allege that there is not, any privity of contract, *lien de droit*, between them and the other defendants, and they make the foregoing plea without waiver of their right of action, either by warranty or otherwise, against any persons who may be responsible for the said accident, by which the said James Finn was injured.'
>
> The court has arrived at the conclusion that no more complete severance of defense could have been made, and that the plaintiffs' reservation of their recourse could not have been couched in clearer language. The essential element to constitute *chose jugee* between the present plaintiffs and defendants is wanting, there never was any issue joined between them, in the matter at issue, and consequently there could not be any judgment determining an issue that did not exist. * * *
>
> The plaintiffs paid the amount of the award against them, and they now come before the Court, as they have a right to do, to fix by evidence responsibility of the amount upon the defendants."

Judgment for plaintiffs for $1,500 and costs of present action.

The relative positions of the parties in the foregoing, and in the case at bar are identical and in each case *res judicata* was a plea.

The principles stated in the following authorities amply support the reasoning of the court in the cases just cited.

In the case of Capital Traction Company vs. Vawter, 37 App. D. C., 29, which was a negligence case, the sole question presented was whether or not the court erred in permitting two separate and distinct verdicts to be rendered by the jury in the case, and the court said in its opinion:

> "We think that, while it is a matter largely of discretion in the trial court, consideration should be given, before directing a verdict at the close of the evidence offered by plaintiff, to the probable effect upon the remaining co-defendants. If the action is one *ex contradictu*, it is clear that the course here pursued might operate to enlarge the liability of the remaining defendants by depriving them of the right to enforce contribution in the event of a judgment against all. On the other hand, no reason is apparent for applying this principle to the case at bar. The action is *ex delicto*, and the defendants, had a joint judgment been rendered against them, would have been in the situation of joint tort feasors, with no right of action for contribution against each other. It is difficult to understand how appellant can be injured by the ruling."

In Oceanic Co. vs. Comp. Trans. Espanola, 134 N. Y., 461; 30 Am. St. Rep., 690, the court said:

> "The defendant in the action would not be bound by the judgment as a party, for he was not a defendant in the first action; but had he been joined as a defendant, and both had been adjudged liable, the judgment

would not necessarily have determined, as between them, whether either was or was not primarily liable, because that question could not have been litigated in the first action, at least it could not have been without the consent of all the parties to it, and of the trial court, and then only through the aid of a special verdict or of a special finding. The judgment in an action first brought is proof in the second action of the liability, and the amount therof, of the defendant in the first action, to the plaintiff therein.'

In Churchill vs. Holt, 127 Mass., 165; 34 Am. Rep., 357, the court said:

"The ground taken by the defendants, that the judgment in the suit by Meston against the plaintiffs is conclusive against the right to maintain this action, can not be sustained."

In Finley vs. Cathcart, 149 Ind., 470; 63 Am. St. Rep., 292, the court said:

"The facts necessary to constitute a cause of action in favor of the Mabrys, and entitle them, under the statute, to a partition of their alleged moiety, it would seem, were that they held and owned the same in the lands described in their petition, undivided, as tenants in common with the defendants. These appear to have been the only material issues which were tendered by the petition to the defendants. All such matters, and all others coming within the material issues in the case, as between the plaintiffs and defendants, must be held to have been settled by the judgment, and as to such matters it would not be open to collateral attack. But it can not, in reason, be said that the issue so raised by the petition must be presumed and held to have conclusively settled all matters between the defendants. As it appears, none of the defendants filed a cross-com-

plaint, nor in any manner appeared to the action, and requested partition of their interests, and in reality no issue was raised in any way by the defendants as between each other. It is evident, therefore, under such circumstances, in the light of the authorities, that it can be said that the court was not called upon, nor was it relevant for it, to examine into and determine matters of an adverse nature existing between any of the defendants."

In City of Owensboro vs. Westinghouse, 91 C. C. A., 335, the court said:

> "Where joint defendants appeared by different attorneys, made separate answers and defenses, and separate judgments were rendered as to each, there being no cross-pleadings or issues between them, neither a judgment against the one nor in favor of the other in said action created any estoppel as between them which affected a subsequent action by the one against which judgment was rendered to recover the amount of the same from the other as primarily liable therefor."

Leaman vs. Sample, 91 Ind., 236, was a suit by one indorser against another for contribution. In first suit on note indorsers filed separate answers. Held, judgment not *res adjudicata* of suretyship between indorsers in second suit, there being no issue between them in first suit on question of suretyship.

In Harvey vs. Osborn, 55 Ind., 541, the court said:

> "Where two parties are sued in the same action, and one files a separate answer to the complaint, and not in the nature of a cross-complaint against his co-defendant, such co-defendant can not demur or reply to, or join issue in any manner upon such separate an-

swer. And in such a case, the finding and judgment of the court, on an issue joined on such separate answer by the plaintiff, will not necessarily conclude and determine any of the merely relative rights of the defendants, as between themselves."

In Smith vs. Woolfolk, 115 U. S., 148, the court said:

"It is settled that one defendant can not have a decree against a co-defendant without a cross-bill, with proper prayer, and process or answer, as in an original suit."

In King vs. Chase, 41 Am. Dec., 675, the court said:

"And the matter in issue within the meaning of the rule that a judgment is a bar to a subsequent action as to the matter in issue in the former trial, is the matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, and are not the facts offered in evidence to establish the matter in issue, though they may be controverted at the trial."

In the case of O'Connor vs. New York & Y. Imp. Co., 28 N. Y. Suppl., 544, the court said:

"A judgment rendered in an action for or against the plaintiff therein is not *res judicata* of the matters determined, in favor of one defendant as against a co-defendant, where the interests of the defendants were not joint, and no issue between them was tendered or litigated. Neither of such defendants is estopped from disputing the matter so determined as against the other."

Appellant's contention is, that, because of the language used by the court in directing a verdict in its favor and

against McCloskey, the judgment rendered thereon was a judgment against the Fuller Company. Applying the principles announced in the following cases, anything which the court may have said, which would appear to affect the other defendant, the Fuller Company, when directing a verdict for the defendant, the Otis Company against McCloskey, was *res inter alios acta.*

But that judgment speaks for itself and shows that it was merely a finding between the Otis Company and McCloskey, otherwise it would have been, as to the Fuller Company, *coram non judice.*

> "Without a judgment the plea of *res judicata* has no foundation; and neither the verdict of a jury nor the findings of a court, even though in a prior action, upon the precise point involved in a subsequent action and betwen the same parties, constitute a bar. In other words, the thing adjudged must be by a judgment. A verdict or finding of the court alone is not sufficient. The reason stated is that the judgment is the bar, and not the preliminary determination of the court or jury. It may be that the verdict was set aside, or the finding of facts amended, reconsidered, or themselves set aside, or a new trial granted. The judgment alone is the foundation for the bar."
>
> City of Oklahoma vs. McMaster, 196 U. S., 529.

> "The general rule is, that the issuable facts or matters, upon which the plaintiff's case proceeded, determine what was in issue, unless it appears from an examination of all the pleadings in a given case, that other matters were brought forward and thus became necessarily involved and determined in the suit. Davis vs. Brown, 94 U. S., 423; 94 U. S., 606; Cromwell vs. County of Sac, 94 U. S., 351.

A judgment upon matters not thus in issue is not conclusive, and subjects adjudicated which were not in issue may be inquired into collaterally, notwithstanding the judgment. Munday vs. Vail, 34 N. J., 418; 25 N. Y., 613.

The finding and judgment were, therefore, not only irregular, but *coram non judice* because it acted on a matter not before it."

McFadden vs. Ross, 108 Ind., 512.

3. Authorities Applied.

The foregoing authorities have clearly stated the principles of *res judicata*, and have shown why the first judgment can not be a bar to a suit for indemnity upon a state of facts similar to that of the case at bar.

Because the law is so well settled on this point, counsel for appellee deems it needless to do more than direct the attention of the court to the situation of the appellant and appellee in the McCloskey case. The similarity to the cases cited will then become apparent.

McCloskey charged the appellant with negligence in fact and the appellee with negligence in law, and did not charge joint, concurrent and disseverable acts. Capital Traction Co. vs. Vawter, *supra*. The defendants filed separate pleas of the general issue. No other pleas were filed. There was no cross-pleading between the defendants and under our system of common law pleading there could have been none. City of Owensboro vs. Westinghouse Co., *supra*. Harvey vs. Osborn, *supra*. Smith vs. Woolfolk, *supra*. Oceanic Co. vs. Comp. Trans. Esp., *supra*.

The plaintiff, alone, controlled the introduction of evidence in chief against both defendants, and when insufficient to make out his case against the Otis Company it was not subject to the control of the other defendant, the Fuller Company. At the end of the plaintiff's case in chief, the

court directed a verdict in favor of the Otis Company and against the plaintiff, McCloskey, without objection on the part of the plaintiff. This amounted to a dismissal as to the Otis Company. This action was not one under the control of the other defendant and objection on its part would have been no valid ground for exception. It was not prejudicial of the rights of the remaining defendant.

There were, therefore, no adversary proceedings between the two defendants. Pullman Co. vs. Cin. R. R. Co., *supra*. Capital Traction Co. vs. Vawter, *supra*. The dismissal as to the Otis Company precluded cross-litigation between the defendants, even if such could have been initiated under our trial system without cross-pleadings and a distinct issue of fact.

> "An issue is a single, certain and material point, arising out of the allegations or pleadings of the parties, and generally should be made up by an affirmative and negative."
>
> Simonton vs. Winter, 5 Pet., 141.

The judgment rendered on the verdict for the Otis Company was not one against the Fuller Company. It was merely that the plaintiff, McCloskey, take nothing as against defendant Otis Company and that the defendant be dismissed with costs (Record, p. 33).

The judgment against the Fuller Company subsequently rendered was not for the Otis Company but for the plaintiff, McCloskey. It is clear, therefore, that in the case at bar there was a variance between the proof and the plea of *res judicata*.

All of these circumstances having been exhaustively considered by the authorities cited, and judgments of this kind having been held to be no bar to indemnity suits, it can not be seriously contended that the trial court, in the case at

bar, erred on the law in refusing to instruct the jury to return a verdict for the defendant (Assignment 2) or in denying the defense of *res judicata* (Assignment 3).

The proposition now advanced by counsel for appallant, in their brief (page 12), that it is wholly immaterial whether the parties to the present suit were adversary parties in the McCloskey suit would involve a change of front and carry with it an admission that they were not adversary parties. The plea of *res judicata* filed for the Otis Company by the same counsel alleged that they were adversary parties in the McCloskey suit (Record, p. 4). It would appear that counsel understood the principles of *res judicata* better when they drew that plea than when they wrote their brief. For without adversary parties and without a judgment in favor of one and against the other there can not be *res judicata*. Freeman on Judgments, Sec. 158.

4. Case at Bar and McCloskey Case Differentiated.

The relative rights of the defendants in the McCloskey suit were not concluded and determined, as between themselves. Harvey vs. Osborn, *supra*.

The contractual relations between them with regard to the elevator service were not in evidence in the McCloskey case. The Fuller Company had the right in the case at bar to show what these relations were for the purpose of establishing the primary liability of the Otis Company.

In the McCloskey case, witness Baird, testifying for the Fuller Company in defense, said that "he did not recall any arrangement with the Otis Elevator Company for the use of that elevator; that it is customary for the builder to use the car for the benefit of all desiring it; that he did not think there was any special arrangement made, and that he was the only one to make any such arrangement" (Record, p. 78).

This was all of the evidence in the case bearing on the contractual relations of the defendants, except for any inference to be drawn from the language in which the bill (Record, p. 50) was couched.

In the case at bar, witness Baird, for the plaintiff, testified that there was no written contract and no special agreement between the Fuller Company and the Otis Company; nothing other than their customary arrangement; that the Fuller Company enmployed the Otis Company to give elevator service with the passenger elevators for the use of persons engaged in finishing up the building, and particularly to assist the Mackay Company to paint the shaft, using the elevator as a traveling platform; that the Fuller Company had always employed the Otis Company to do similar work before that occasion wherever the Otis Company supplied the elevators for the building, and the witness named several buildings previously erected where the Fuller Company had so employed the Otis Company, namely, Munsey Building and Union Trust Building, and in each instance the Otis Company supplied the elevator service for the painting of the elevator shaft; that the Fuller Company employed the Otis Company to do this work instead of doing it themselves because the work was in the line of the Otis Company's business and not in theirs; that according to his recollection there was no special arrangement made with the Otis Company for the elevator service in the Hibbs Building, it was furnished under their customary arrangement; that the Fuller Company never took the elevator operator into its employ; that the company never employed that class of mechanics; that a subordinate clerk would pass on such bills as in evidence (Record, p. 13), and when a check in payment was drawn, they would come to the witness for his signature to the check and he never gave any consideration to the language in which a bill was couched (Record, pp. 11, 12, 16 and 17).

This evidence satisfied the jury that the Otis Company had undertaken to do this work for the Fuller Company; to supply elevator service for painting the elevator shaft, including the use of the elevator as a movable platform, by Mackay's painters, and that the bill did not correctly express the terms of the hiring contract. These facts are established by the verdict of the jury.

> "The fact that a railroad company gives a shipper a bill of lading when the goods are delivered does not preclude the shipper, in an action against the company as common carriers, from showing, when such is the fact, that the bill of lading does not express the terms of the transportation contract."
>
> Mobile Ry. Co. vs. Jurey, 111 U. S., 584.

In view of the fact that this elevator service was furnished by the Otis Company under a customary arrangement with the Fuller Company and not under a special agreement or written contract for the Hibbs Building, it was proper to show the circumstances under which the Otis Company previously furnished the Fuller Company with elevator service for the painters on other buildings as tending to prove what was their customary arrangement and what was the parol agreement.

In Railroad Co. vs. Pratt, 22 Wall., 123, the court, speaking of the contract, said:

> "Such an undertaking may be established by express contract, or by showing * * * circumstances indicating an understanding that it was to carry through."

Upon the state of the evidence, it was for the jury to say whether the agreement was as indicated by all the circumstances, or whether, as contended by the Otis Company, the bill showed the agreement. The appellant's first assign-

ment of error is therefore without merit. Packet Co. vs. McCue, 17 Wall., 508; Lancaster vs. Collins, 115 U. S., 222.

5. Questions of Fact Properly Submitted to Jury.

It being made plain by the application of the authorities to the case at bar that appellee was not barred nor estopped from proving the facts, it was not error for the trial court to submit to the jury the evidence as to the employment of the Otis Company for a finding of fact (fourth, fifth and sixth assignments of error).

The question whether one is an independent contractor, when a matter to be decided upon oral evidence as to the amount of control or upon verbal contracts or employment, is a question for the jury, acting under instructions from the court as to what is requisite to constitute the relation. When, however, the existence of the relation depends on a written contract of employment, it is for the court to construe the contract in this regard. Sullivan vs. Dunham, 35 N. Y. App. Div., 342; Linnehan vs. Rollins, 137 Mass., 123, 50 Am. Rep., 287; Rogers vs. Florence, 31 S. Car., 378; Emerson vs. Fay, 94 Va., 60.

The court did not rule as stated in the fourth assignment of error. What the court did rule was that the judgment in question was not a bar to this appellee.

6. Otis Company Undertook to Do the Work.

It being established by the verdict in the case at bar that the Otis Company undertook to do this work for the Fuller Company, the former, therefore, was not a stranger to the arrangement between the Mackay Company and the Fuller Company, but was a privy, and the admission in the brief of counsel for appellant at page 12, that

the Otis Company knew of the use which was being made of its elevator by its operator and the Mackay painters is consistent with the facts of the employment of the Otis Company as here shown for the first time.

Having thus undertaken to discharge the duty of the Fuller Company to Mackay Company and its painters, and in doing so, being negligent, the Otis Company was primarily liable. Oceanic Co. vs. Comp. Trans. Espanola, *supra.*

7. Otis Company Also Doing Other Work of Its Own When Accident Occurred.

There was also evidence in this case, which was uncontradicted, that the Otis Company had undertaken to do work for others, presumably for the owner of the building, and was engaged in doing it when the accident occurred.

The office building was partially occupied by tenants at the time, some having offices on the eighth or ninth floors (Record, p. 20), and the Otis Company carried passengers in their elevators, without permission from the Fuller Company (Record, p. 21), when working for it, and at the time of the accident to McCloskey, the elevator was carrying passengers up (Record, p. 24).

A strong inference arises from this evidence that the passengers carried were tenants. The evidence as to tenants was not before the court in the McCloskey suit.

Whether the Otis Company was doing this work under contract with Hibbs or voluntarily, is immaterial. The fact, alone, that it was doing other work of its own, rendered it primarily liable for the accident. That it was also doing work at the same time for the Fuller Company did not relieve the Otis Company from such primarily liability, although it did subject the Fuller Company to a secondary liability on that account.

8. Contention That the Otis Operator Was in Special Service of Fuller Not Supported by Facts of Case at Bar.

The Otis Companys' parol agreement to supply the elevator service for the painters in the shaft, as found by the jury, removes the question of the status of the Otis employee from the realm of speculation and inference indulged in by counsel for appellant to support their argument on this point. To apply the rule laid down in Standard Oil Co. vs. Anderson, as contended by appellant, would be to disregard the principles announced in that case and utterly destroy the doctrine of independent contractors. It is a matter of common experience that property owners having repair work about the premises to be done, will engage a plumbing concern, a painting concern, or carpentry concern, to do the work, and supply labor and materials. The bill will come in, itemized as to mechanics so many hours, at so much per hour, and materials at such and such cost. It becomes known then for the first time, frequently, what the total expense of the work amounts to. Can it be said with show of reason that it was in contemplation of the parties, either when the work was arranged for or the bill paid, that the workmen employed by the plumber concern, or painter concern, were, as between the parties, taken into the special service of the propefty owner?

9. Question of Agency in Case at Bar Different From That in McCloskey Case.

The difference can best be stated in the language of the learned trial judge.

In submitting the case, the court said:

> "I think all that was decided in the case of McCloskey against the Fuller Company was that as be-

tween those two companies (Mackay and Fuller) the Fuller Company was undertaking to furnish this service, and there was no direct relation between the Mackay Company on the one hand, or McCloskey the workman for the Mackay Company on the one hand, and the Otis Company on the other; the relation was between the Mackay Company and the Fuller Company, and between McCloskey and the Fuller Company, and there was a breach of duty there.

"But at the same time I think the evidence tends to show that in this very act which caused the accident, Locke was the Otis Company as between the Fuller Company and the Otis Company. In the other case, of McCloskey vs. the Fuller Company, not only was Locke the agent and servant of the Fuller Company, but the Otis Company itself was the agent of the Fuller Company.

"But you see how different the question is when it arises between the Fuller Company and the Otis Company, if the Otis Company had arranged to furnish this service, to furnish an elevator, to furnish an operator in its control except so far as obeying signals was concerned, paid by the Otis Company and liable to be discharged by the Otis Company, although alone and under general instructions as to the running of its elevators. If that was the situation, then the Otis Company might be liable to the Fuller Company, although the Fuller Company would be liable to McCloskey. So that I think we shall have to submit the case to the jury and have them decide whether the relation was such as I have indicated or whether the Otis Company and its servant, Locke, at the time when the accident occurred, was acting under this employment or arrangement with the Fuller Company and bound to exercise due care, and whether it failed to exercise due care, and whether that failure occasioned this accident and injury which the Fuller Company have had to answer for." (Record, p. 104.)

10. In Instructing the Jury as Quoted the Trial Judge Correctly Stated the Law.

> "Their contract was to produce a specified result. They were to furnish all material and do all the work, and by the use of that material and the means of that work were to produce the completed structures. The will of the companies was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors."
>
> Casement vs. Brown, 148 U. S., 615.

In Murray vs. Dwight, 161 N. Y., 301:

The facts were: Servant of a truckman was sent to a warehouse with truck and wagon, to haul barrels of lime within the warehouse from one store to another by means of a block and tackle belonging to warehouseman (defendant), whose servants were engaged in rigging it up on outside of warehouse when plaintiff arrived. He detached horse from truck to hitch him to the line thus rigged up, for motive power to lift barrels on the inside. While plaintiff was walking underneath, to enter the door, the block fell and injured him.

Held, that plaintiff still remained in the employ of the truckman and was not transferred to the service of the defendant.

In Driscoll vs. Towle, 181 Mass., 416:

The facts were: The defendant was engaged in a general teaming business. A horse and wagon belonging to the defendant and driven by a driver in the general employ of said defendant, knocked the plaintiff down and injured him. For some time the driver had been carrying property for an electric lighting company under some arrangement made with that company by the defendant. Every morning the driver reported with his horse and wagon to the

company and after carrying out its orders all day returned at night to the defendants' stables. Sometimes he gave help, outside of driving his wagon and loading and unloading it, in pulling up arms on electric light poles, carrying up machinery and the like. When the accident happened he was on his way to get some arms in pursuance of an order from the foreman of the company.

Held, that there was evidence to go to the jury that the driver remained the servant of the defendant. The opinion of the court was delivered by Holmes, C. J.

In Gerlach vs. Edelmeyer, 47 N. Y. Sup., 292:

The facts were: Defendants contracted with a firm of builders, to furnish the machinery and men and to hoist brick, etc., for a building erected by the builders, and the deceased, an employee of a sub-contractor, was killed while carrying a beam through an elevator shaft, the elevator falling on him due to the engineer's foot slipping off the brake. Engineer had told deceased it was all right to go under.

Held, that as the engineer was employed by defendants and controlled by them, he was their servant and not servant of contractor and not a fellow-servant of deceased.

See also notes to Brown vs. Smith, 22 Am. St. Rep., 459.

Upon careful consideration of these authorities it would appear to be plain that the trial judge, in instructing the jury that the question of agency is different from the question presented in the case of McCloskey against the Fuller Company, did not commit error (seventh assignment of error). As heretofore shown, it was a question of fact for the jury to determine under the instructions of the court, and, therefore, to submit it was not error (sixth assignment of error).

Contending that the court erred in denying the motion

for a directed verdict, counsel for appellant state in their brief (page 21) that the case of McCloskey vs. Fuller and Otis, was an action against joint tort-feasors, and that under the authority of Gas Light Company vs. D. C., 161 U. S., 316, there can be no recovery except where a municipal corporation has been compelled to answer in damages for the acts of a contractor or property owner.

The principles announced by the Supreme Court in that case have been incorrectly stated by counsel. What the court said was:

> "The rule, however, is not predicated on the peculiar or exceptional rights of municipal corporations. It is general in its nature. It has been applied to public piers. To the right of a property owner to recover for damages which he had been compelled to pay for a defective wire attached by a Gas Light Company to the chimney of the owner's house. To the right of a master to recover over the damages which he had been obliged to pay in consequence of a servant's negligence. Indeed, the cases which illustrate the rule and its application to many conditions of fact are too numerous for citation and are collected in the text books."

And, as heretofore quoted, the court also said that only in cases involving moral delinquency or turpitude are all parties deemed equally guilty and an action by one wrongdoer against another to recover indemnity disallowed. But, said the court, where the offense is merely *malum prohibitum*, the right to recover indemnity exists.

McCloskey sued the defendants because of an offense which was merely *malum prohibitum* and not one involving moral delinquency or turpitude.

The facts in Union Stock Yards Co. vs. C. B. & Q. R. R. Co. differentiate that case from Gas Light Co. vs. D. C. and other cases cited by appellee.

The accident to the employee of the terminal company was caused by a defective brake staff of a car received from the railroad company. The court said:

> "In the present case there is nothing in the facts as stated to show that any negligence or misconduct of the railroad company caused the defect in the car which resulted in the injury to the brakeman. * * * But in the present case the omission of duty for which the railroad company was sought to be held (by the terminal company) was the failure to inspect the car with such reasonable diligence as would have discovered the defect in it. * * * But that the terminal company owed a similar duty to its employees, and neglected to perform the same, to the injury of an employee, has been established by the decision of the Supreme Court of Nebraska. * * * The case then stands in this wise: The railroad company and the terminal company have been guilty of a like neglect of duty in failing to properly inspect the car before putting it into use by those who might be injured thereby. We do not perceive that, because the duty of inspection was first required from the railroad company, that the case is thereby brought within the class which hold the one primarily responsible, as the real cause of the injury, liable to another less culpable, who may have been held to respond in damages for the injury inflicted."

The court then points out that the case is not like Gas Light Company vs. D. C. and other cases where the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted, and continued:

> "In the present case the negligence of the parties has been of the same character. Both the railroad company and the terminal company failed, by proper inspection, to discover the defective brake. The ter-

> minal company, becouse of its fault, has been held liable to one sustaining an injury thereby. We do not think the case comes within that exceptional class which permits one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another."

The law as laid down in these cases was not authority for a directed verdict in favor of the defendant in the case at bar. To the contrary, it is excellent authority for the overruling of the motion, and the action of the court in doing so was correct. Old Colony R. R. vs. Slavens, *supra.*

11. The Verdict of the Jury Settles All Questions of Fact.

Counsel for appellant devote much of their brief to a discussion of the weight of the evidence upon which the jury found the facts as averred, and contend that there are inconsistencies in the evidence for the Fuller Company and also in the attitude of its counsel, amounting to a change of position, when comparison is made of the case at bar with the McCloskey case.

In the case at bar the verdict establishes as fact that the Otis Company hired itself to the Fuller Company to furnish elevator service to assist the Mackay Company to paint the elevator shaft, and that its operator was not in the special employ of the Fuller Company, and that verdict ends discussion of the weight, force or degree of the evidence on which the verdict was returned.

> "The verdict of the jury settles all questions of fact." Smiley vs. Kansas, 196 U. S., 550.

> "And if there is competent evidence of such con-

tract put before the jury, the weight, force or degree of such evidence is not open for consideration by this court."

Railroad Co. vs. Pratt, *supra.*

However, the evidence in both cases, as well as the positions assumed by counsel for Fuller Company, are entirely consistent. The testimony of witness Baird, for the Fuller Company, as to the arrangement for elevator service, has heretofore been compared and shown to be consistent throughout, although such comparison is unnecessary, because it was for the jury to say whether his evidence was inconsistent.

In the McCloskey case, Baird said that the Mackay Company received whatever the Fuller Company received from the Otis Company, and this is the fact.

Counsel for the Fuller Company contended in that case that there was no transfer of Locke from the Otis Company to the Fuller Company and that is proven here to be the fact. Counsel contended in that case that if the facts gave rise to the inference that there was a transfer, then, the situation as to the Mackay Company being similar, there was a transfer from the Fuller Company. While that contention may have been faulty, because, as pointed out by this court on appeal, the evidence did not support it, yet it can not be said that the attitude of counsel in the case at bar is inconsistent because of that contention.

Nor is there any inconsistency because counsel in his brief in that case used the argument quoted in appellant's brief (page 17).

The assumption referred to creates no inconsistency here. It was based on the state of facts as found by the jury under the law as given by the court in that case. As far as McCloskey was concerned, Locke, in point of law, was the servant of Fuller.

In the present case, when the relations of the defendant are inquired into, the Otis Company is found to be the agent of the Fuller Company, and Locke to be Otis' employee. Locke, in the McCloskey case, the servant of Fuller in law, and Locke, in the present case, the servant Otis in fact, are entirely consistent.

What was averred by McCloskey and what the jury found in his case, was that the Mackey Company arranged with the Fuller Company for the operation of the elevator so that McCloskey could paint the inside of the elevator shaft, and the Fuller Company employed the Otis Company to do this work for the Mackay Company, and that is exactly what was averred and established as fact in the present case.

So that, aside from the evidence and the position of the Fuller Company, the allegations in both cases and the facts established by the findings of the two juries, are not merely consistent, but similar.

12. Considering the eighth and last assignment of error, either the Otis Company was concluded as to Locke's negligence by the McCloskey judgment against Fuller, under the principle in Gas Light Company vs. D. C., *supra,* or it was necessary for the Fuller Company to prove it as a substantive fact at the trial of its case against Otis.

If the former, then, the error, if any, in submitting the question to the jury, was prejudicial to the Fuller Company, and not to Otis, and the latter can not complain. D. C. vs. Wilcox, 4 App. D. C., 90.

If the Fuller Company had to show Locke's negligence, as a substantive fact, then the question was one for the jury and was properly submitted.

In conclusion, it is respectfully suggested to the court that wherever reference to the evidence, either in the case at bar or the McCloskey case, may become necessary, the

record itself be used, rather than the statement of such in the brief for appellant.

Incorrect statement of some of the authorities, namely, the case of Gas Light Company vs. D. C., and Union Stock Yards Co. vs. C. B. & Q. R. R. Co., has already been pointed out, and, likewise, appellant's brief contains many incorrect statements of the evidence.

An instance is to be found on page 23 of their brief, as follows: "It was also *not denied* that said general servant had been hired to the Fuller Company," when such is not the evidence in this case. The contrary was shown and established by the verdict.

"The same evidence was before the court in both trials. The facts were undisputed * * *" (Appellant's brief, p. 7), which is an incorrect statement of the evidence. "This general employee of the Otis Company was transferred with the car to the Fuller Company" (Appellant's brief, p. 14), which also is not the fact as shown at the trial. Other instances could be cited, but to do so and to compare them with the facts in evidence would be to unnecessarily enlarge this brief for no useful purpose. The facts discussed by appellant's counsel have been settled for this case by the verdict. It will be sufficient to point out that if counsel consider that facts were "not denied," or "the same evidence was before the court," or the facts of this or that question "were undisputed," as contended, why do they devote so much of their brief to discussion of the weight of witness Baird's evidence (brief, pp. 19, 20, 21)?

III.

Appellant's Violation of Rule V.

The attention of the court is directed to the ten pages (pages 15 to 24, both inclusive, of the record) of the bill

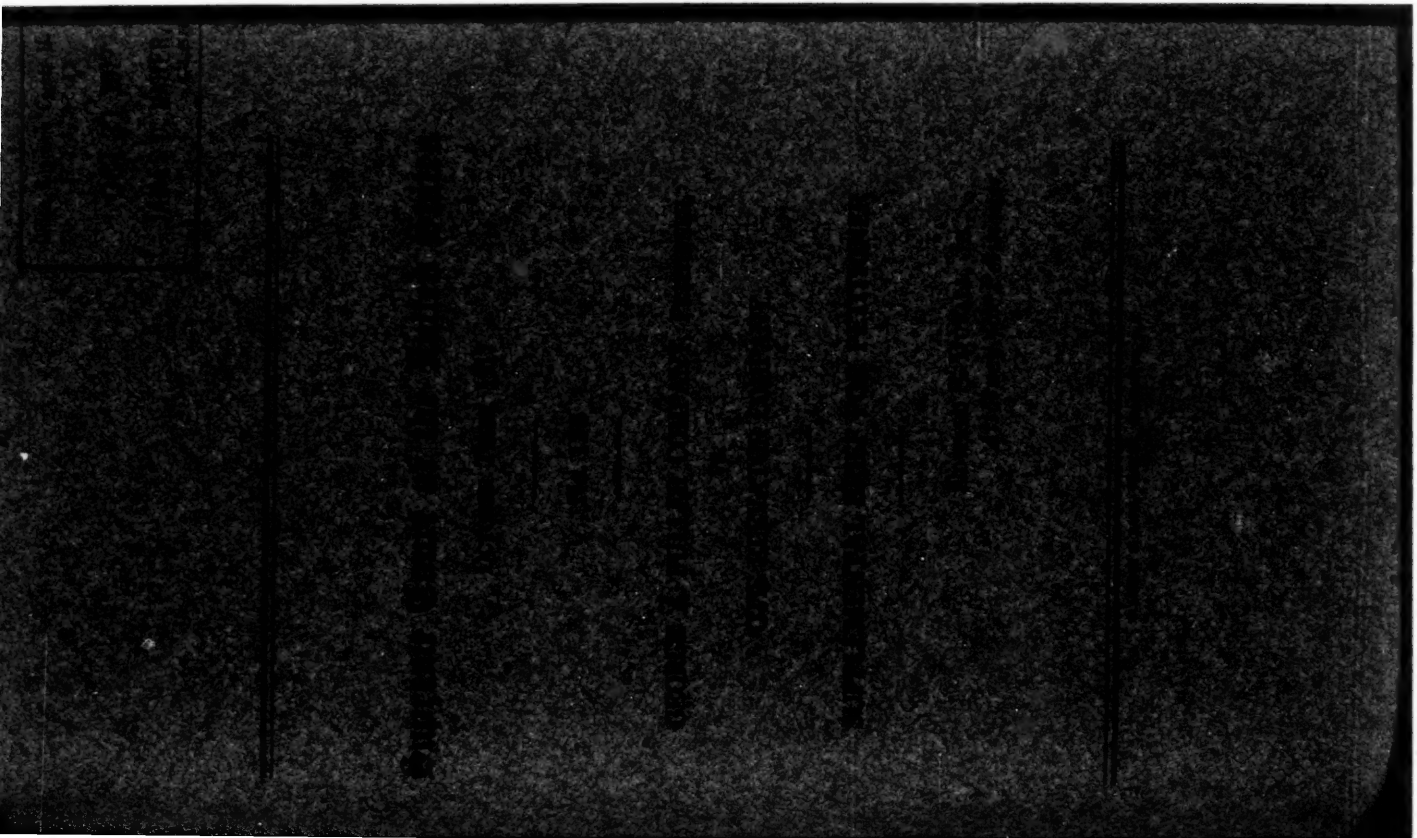
of exceptions, where the evidence is stated in the form of questions and answers, instead of narrative form, in violation of Part 5 of Rule V.

When a copy of the bill of exceptions was served, the statement was volunteered by counsel for appellant that they were aware of their violation of the rule in incorporating the questions and answers referred to, and they assumed the risk. Because of this statement counsel for appellee feels free to invoke the rule.

Brown vs. Fire Ins. Co., 21 App. D. C., 325.
Frazier vs. D. C., 21 App. D. C., 154.

It is respectfully submitted that the bill of exceptions should be stricken out and the appeal dismissed; otherwise there is no error in the record and the judgment appealed from should be affirmed.

EDWARD S. DUVALL, JR.,
Attorney for Appellee.



Supreme Court of the United States

OCTOBER TERM, 1917

No. 128

GEORGE A. FULLER COMPANY, PETITIONER,

vs.

OTIS ELEVATOR COMPANY.

SUPPLEMENTAL BRIEF FOR PETITIONER

On the argument of this case counsel for the petitioner will use his brief which accompanied the petition for the writ of certiorari and asks leave of court to supplement the same with the specification of errors submitted herewith and that they may be considered in conjunction with the statement of the case and the argument contained in the petition and brief.

Specification of Errors.

1. The Court of Appeals erred in holding that while the plea of *res judicata* cannot be sustained in the present action, the main points essential to recovery here were adjudicated in the original suit (*McCloskey* v. *Fuller Co. and Otis Co.*) on substantially the same evidence as that upon which the Fuller Company now pitches its case and that in so far as these matters were disposed of in the former case, plaintiff will be estopped to invoke their aid here. (R. p. 114.)

2. The Court of Appeals erred in holding that the status of the elevator operator was adjudicated between the Fuller Company and the Otis Company in the case of *Fuller Company* v. *McCloskey*, 228 U. S. 194. (R. p. 117.)

3. The Court of Appeals erred in holding that the evidence touching the agreement between the Fuller Company and the Otis Company relative to the use of the elevator is substantially the same as in the prior case. (R. p. 116.)

4. The court below erred in holding that the facts as to the contract between the Fuller Company and the Otis Company were adjudicated in the prior case and therefore not open to the consideration of the jury in the instant case. (R. p. 116.)

5. The court below erred in holding that the weight and force of the evidence concerning the carriage of passengers in the elevator by the Otis Company at the time of the accident were insufficient to support the allegation, established by the verdict of the jury, that the Otis Company was operating its elevator upon its own responsibility for the carriage of tenants of the building at the time of the accident, as well as before and after. (R. p. 120.)

6. The court below erred in reversing the judgment.

Respectfully submitted,

EDWARD S. DUVALL, JR.,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 909 [redacted] 128

GEORGE A. FULLER COMPANY,
A Corporation, Petitioner,

vs.

OTIS ELEVATOR COMPANY,
A Corporation, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI.

FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
Attorneys for Respondent,
Otis Elevator Company.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 909.

GEORGE A. FULLER COMPANY,
A CORPORATION, PETITIONER,

vs.

OTIS ELEVATOR COMPANY,
A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI.

The petitioner seeks a review of the decision of the Court of Appeals of the District of Columbia reversing a decision of the Supreme Court of that District in the case at bar, which was an action to recover the total amount of the judgment, interest, and costs paid by the petitioner in satisfaction of a judgment rendered against it in said Supreme Court in an action for personal injuries brought by one Wilson A. McCloskey against the George A. Fuller Company and the Otis Elevator Company, defendants, wherein the Fuller

Company was held solely responsible by the decisions of the Supreme Court and the Court of Appeals of the District of Columbia (35 App. D. C., 595), and of this honorable court (228 U. S., 194), after a full review of the facts and law applicable thereto.

The unanimous decision of the Court of Appeals in the instant case is in harmony with and strictly adheres to and upholds the decision of this court in said original suit, and reverses the decision of one of the trial justices of the Supreme Court of the District of Columbia who had refused to hold that the plaintiff below (the petitioner here) was concluded by the decision of this court in said original case upon the sole question of fact and law there involved which lay at the root of said plaintiff's (petitioner's) right to recover in this action of indemnity.

The case involves no constitutional or Federal question, no question of general law or of public interest, no departure from the controlling decisions of this court, no conflict with decisions of other Federal courts, but solely a question of the local law of the District of Columbia applicable in a private controversy between two contracting corporations as to which of them should pay for the injuries sustained by an injured workman.

Mr. Justice Hughes, in delivering the opinion of this court in the case of *McCloskey vs. The Fuller Company*, adopted the following succinct summary of the facts from the opinion of the Court of Appeals in that case:

> "The defendant company contracted with William B. Hibbs to erect for him an office building on 15th street in this city. The work was to be completed by a time certain. This contract did not include the installation of an elevator. That work was provided for in a contract between Hibbs and the Otis Elevator Company. The elevator company installed its elevator long before the completion of the building. This elevator, down to the time of the injury to the plaintiff, had not been turned over to the owner of the building, but was operated by an em-

ployee of the Otis Company, who was paid and generally controlled by that company. After its installation the defendant company entered into an arrangement with the elevator company by which it became entitled to use this elevator in the prosecution of its work, paying to the elevator company three dollars per day, which was to cover the wages of the caretaker or operator aforesaid, the Otis Company reserving the primary right to use the elevator. Under this arrangement the defendant company was to have no control over the elevator operator other than to notify him when to start and when to stop his machine.

"The defendant company entered into a subcontract with the Robert E. Mackay Company of New York for the painting required by its contract with Mr. Hibbs. The plaintiff was an employee of the Mackay Company. The elevator shaft was included in this subcontract. To paint this it was of course necessary that some means be provided whereby workmen could ascend and descend the shaft. Therefore the Mackay Company entered into an agreement with the defendant company by which the defendant company agreed to furnish the Mackay Company, for use in painting said shaft elevator, power and operator at any time that the elevator company or the defendant company did not want them. Nothing whatever was said about the arrangement between the elevator company and the defendant company, the agreement between the Mackay and the defendant company proceeding upon the theory that the equipment and elevator were under the control of the defendant company. The Mackay Company was not to have, and in fact did not have, any control over the operator other than to direct him when to start and when to stop his elevator while thus temporarily used as a movable staging.

"Upon the day of the accident plaintiff and another workman were on the roof of the elevator touching up the walls of the shaft. They had worked down until the floor of the car was on a level with the first floor of the building. To finish the walls of the shaft between the first and second floors of the building, the space then occupied by the body of the car, it became necessary to get under the car. To do

> this it was necessary for the painters to be taken to the next or second floor landing. The plaintiff was standing on the rim or ledge around the top of the car and facing the center of the car. He had a paint box and brush in his hands. The other painter was on another side of the top with his back to the plaintiff. This rim or ledge was about six and one-half inches wide. Plaintiff called to the elevator operator to take him and the other painter up to the second floor and let them off there. There was evidence before the jury that when the car had reached a point where plaintiff had directed that it be stopped the car paused and suddenly started again, throwing plaintiff off his balance, which he was unable to regain until the car had reached the fifth floor, where he was caught in the weights which passed the car at that point."

In reviewing these facts and affirming the judgment of the lower courts in that case, this court said:

> "It is urged that there is no sufficient averment of the negligence of this company (Fuller Company) and attention is directed to the allegation of the declaration that the plaintiff 'requested the said defendant, Otis Elevator Company, its servants and employees to stop said elevator at the second floor, so that he might get off and alight therefrom.' It is manifest, however, from the other allegations of the declaration that the plaintiff intended to charge, and did charge, negligence on the part of both defendants.
>
> * * * * * * *
>
> "The principal argument for reversal is based on the ruling of the trial court that Locke, the operator of the elevator, was the servant of the Fuller Company. The court below approved this ruling and we find no error in its conclusion. So far as Locke's employment was concerned, there was no dispute as to any matter of fact and the question of the liability of the Fuller Company for his negligence, if he was negligent in the operation of the elevator, was one of law. It cannot be said that, under the arrangement between the Fuller Com-

pany and the Mackay Company, Locke was transferred to the employment of the latter.

* * * * * * *

"It must be concluded that the operating of the elevator under this arrangement with the Mackay Company was an operating of it by the Fuller Company.

* * * * * * *

"In the present case, the Fuller Company obtained the use of the elevator, and the operator, from the Otis Company, and paid therefor. But the Otis Company had nothing to do with the arrangement with the Mackay Company. To this transaction, and to the employing of the top of the elevator as a movable platform for the painters, the Otis Company was a stranger. The Fuller Company, having obtained the use of the elevator, agreed to supply it to the Mackay Company and undertook to furnish that company the necessary service in operating it; it asserted control for this purpose, and assumed the duty of operating with proper care."

Upon satisfying the judgment rendered against it in *McCloskey vs. the Fuller Company*, the Fuller Company instituted this action against the Otis Company which had been let out of the McCloskey case, to recover the amount paid.

In this action to recover over the Fuller Company endeavored to show, contrary to the conclusion of this court, expressed in the last above-quoted paragraph, that the Otis Company was not a stranger to the arrangement made with the Mackay Company and to the employment of the top of the elevator car as a movable platform by the painters, and also endeavored to prove by its own employees, who had testified in the original case, that what the Fuller Company hired was not the elevator, car and operator, but "elevator service," the obvious purpose being to avoid the effect of the decision of this court in the original suit and to escape the consequences of the decision of this court in the case of the Standard Oil Company *vs.* Anderson (212 U. S., 215), where it was held that:

> "One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation" (Op., 220).

A superficial examination of the record submitted with the petition for certiorari shows that the same evidence was before the trial court in both trials. The undisputed facts show conclusively that to the arrangement with the Mackay Company the Otis Company was a *stranger in law*, and not legally responsible for the consequences resulting from such arrangement.

The point in controversy, the issue of fact and law, the matter in dispute which was investigated, litigated and adjudicated in the original action, was: *In whose service was Locke, the elevator operator, at the time of the accident?*

The Otis Company did not contend either in the original suit or in this that Locke did not remain in its general service and subject to its general control; but it insisted, as this court held, that this general employee was transferred with the elevator car to the Fuller Company, and by the latter company for its own convenience, for its own profit, and to assist its subcontractor the Mackay Company, was turned over to the latter for an increased consideration.

The accident arose from a casual act of the operator in disobeying the instructions or signals given him regarding the movement of the car—not from any defect or insufficiency in the car or incompetency of the operator.

The evidence in the case at bar leaves no doubt that in the movement of the car Locke was subject to the orders and under the control of the Fuller Company or its subcontractor, the Mackay Company—that in making such movement he was doing their work and not the work of the Otis Company. The assistant superintendent of the Fuller Company testified (Fisher, R., 20, 21):

"Q. This man was sent by the Otis people to operate this elevator for your purposes, was he not?

"A. He was the man that the Otis Elevator Company sent there to do our work, yes, sir.

"Q. And when he was doing your work he was not doing any work for the Otis Elevator Company, was he?

"A. Not Locke himself.

"Q. And when he was doing your work he was subject to your orders, was he not?

"A. In so far as what I saw he was sent there to do.

"Q. That was simply to run the elevator up and down, was it not?

"A. Yes, sir."

This witness also testified (R., 21) "that while the elevator was being used by the Mackay Company, Locke took his signals when to go up and when to go down, from Minte, the foreman of that company; that this painting of the shaft was a part of the contract of the Fuller Company," and that he had "told Locke to obey the order of Minte and his painters while operating said elevator," and told Locke "to observe the signals that might be given to him, and how the painters wanted the elevator operated" (R., 22).

In his brief filed in this court in the original case counsel for the Fuller Company pointed out the only question of fact and law for the decision of the court in that case in the following language:

> "In moving the elevator up and down the shaft for the accommodation of the Mackay Company, in the performance of its work, in whose service was Locke engaged? Who controlled and directed his movement? Whose work was he doing?"

And after reviewing the Anderson case, *supra*, he replied to his own queries as follows (p. 36):

> "Locke unquestionably was engaged in doing the work of the Mackay Company. He unquestionably was subject to the orders and directions of Mackay's

> painters, and we submit beyond any possible question that at the time of the accident he was the servant of the Mackay Company. If not the servant of the Mackay Company, then he must have been the servant of the Otis Company."

In the original case counsel for the Fuller Company gave in evidence the bill rendered by the Otis Company to the Fuller Company for "one man to take care of elevator and operate same" at the rate of $3 for an eight-hour day (R., 50, 13), and it also appeared in evidence in both cases that the Fuller Company billed the Mackay Company "for use of elevator in painting elevator shaft and tracks" at the rate of $1 an hour (R., 63, 14). Baird, the vice-president of the Fuller Company—who endeavored to show in the instant case that his company had hired "elevator service" from the Otis Company—testified in the original suit as follows:

> "Q. Now, they (the Mackay Company) borrowed the elevator, its service and its operator, for a dollar an hour?
>
> "A. The arrangement was just as I tried to outline it in my testimony.
>
> "Q. Answer my question. Is that so? They were paying a dollar an hour?
>
> "A. They paid a dollar an hour.
>
> "Q. And they were borrowing it, and you were lending it?
>
> "A. I don't know whether you could say they were borrowing it. They were renting it. They were paying for it" (R., 79).

The same evidence as to the nature of the hiring was before the court in both trials; there was no written evidence of the contract other than that contained in the bill rendered to and paid by the Fuller Company, and the circumstances of the hiring as detailed by the Fuller Company's own witnesses were not contradicted by the Otis Company—the legal effect of their acts being the only matter in dispute. The issue of fact and of law, therefore, remained

identically the same in both trials, and the Otis Company moved for a directed verdict upon the grounds that the matter was *res judicata,* and that the Fuller Company was estopped from recovering in this action because the pivotal question of fact and of law had been determined in the original case of *McCloskey vs. Fuller Company,* in favor of the Otis Company.

The Court of Appeals in the case at bar overruled the defense of *res judicata,* but sustained that of estoppel, holding:

> "With the status of Locke fixed in the prior case as the servant of the Fuller Company, based upon the further adjudication that the Fuller Company hired the use of the elevator and Locke, the operator, outright, the Fuller Company is estopped by the judgment now, upon the same evidence there adduced, to shift its position in a suit for indemnity against its codefendant. The matters thus adjudicated in the former case lie at the root of the right to recover here. It is clear, therefore, that, with these matters foreclosed by the former adjudication, the foundation for the present suit is left too weak to support a right of recovery by the Fuller Company."

The Court of Appeals might have rested its decision upon the effect of the decision in *McCloskey vs. Fuller Company* as a *precedent* upon the question of law there involved, the circumstances of the hiring being the same in both cases. Even as between entirely different parties the opinion of this court upon a question of law is controlling in all subsequent controversies presenting a similar state of facts.

This court has held (*American Security & Trust Company vs. District of Columbia,* 224 U. S., 491-5, and *Washington Home vs. American Security Company,* 224 U. S., 486) that by section 250 of the Judicial Code Congress intended to relieve it of indiscriminate appeals from the inferior courts of the District of Columbia.

To grant the application of the petitioner in this case and

so lift the bar of finality from the decisions of the Court of Appeals in actions of this kind, would furnish, we respectfully submit, a precedent for opening the door of this court to similar applications from every dissatisfied suitor in the District of Columbia, and would destroy the beneficent purpose which the Congress by the provisions of said section sought to accomplish.

FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
Attorneys for Respondent,
Otis Elevator Company.

SUBJECT INDEX.

List of Cases Cited.

TEXT AUTHORITIES.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 128.

GEORGE A. FULLER COMPANY, A CORPORATION,
PETITIONER,

vs.

OTIS ELEVATOR COMPANY, A CORPORATION,
RESPONDENT.

RESPONDENT'S BRIEF.

This case was brought here by writ of certiorari granted by this court to review the decision of the Court of Appeals of the District of Columbia reversing a decision of the Supreme Court of that District in the case at bar, which was an action to recover the total amount of the judgment, interest, and costs paid by the petitioner in satisfaction of a judgment rendered against it in said Supreme Court in an action for personal injuries brought by one Wilson A. McCloskey against the George A. Fuller Company and the Otis Elevator Company, defendants, wherein the Fuller Company was held

solely responsible by the decisions of the Supreme Court and the Court of Appeals of the District of Columbia (35 App. D. C., 595), and of this honorable court (228 U. S., 194), after a full review of the facts and law applicable thereto.

The unanimous decision of the Court of Appeals in the instant case is in harmony with and strictly adheres to and upholds the decision of this court in said original suit, and reverses the decision of the justice who tried the case, who had refused to hold that the plaintiff below (the petitioner here) was concluded by the decision of this court in said original case upon the sole question of fact and law there involved which lay at the root of said plaintiff's (petitioner's) right to recover in this action of indemnity.

The case involves no constitutional or Federal question, no question of general law or of public interest, no departure from the controlling decisions of this court, no conflict with decisions of other Federal courts, but solely a question of the local law of the District of Columbia applicable in a private controversy between two contracting corporations as to which of them should pay for the injuries sustained by an injured workman.

Statement of Facts.

Mr. Justice Hughes, in delivering the opinion of this court in the case of *McCloskey vs. The Fuller Company*, adopted the following succinct summary of the facts from the opinion of the Court of Appeals in that case:

> "The defendant company contracted with William B. Hibbs to erect for him an office building on 15th street in this city. The work was to be completed by a time certain. This contract did not include the installation of an elevator. That work was provided for in a contract between Hibbs and the Otis Elevator Company. The elevator company installed its elevator long before the completion of the building. This elevator, down to the time of the injury to the plaintiff, had not been turned over to the

owner of the building, but was operated by an employee of the Otis Company, who was paid and generally controlled by that company. After its installation the defendant company entered into an arrangement with the elevator company by which it became entitled to use this elevator in the prosecution of its work, paying to the elevator company three dollars per day, which was to cover the wages of the caretaker or operator aforesaid, the Otis Company reserving the primary right to use the elevator. Under this arrangement the defendant company was to have no control over the elevator operator other than to notify him when to start and when to stop his machine.

"The defendant company entered into a subcontract with the Robert E. Mackay Company, of New York, for the painting required by its contract with Mr. Hibbs. The plaintiff was an employee of the Mackay Company. The elevator shaft was included in this subcontract. To paint this it was, of course, necessary that some means be provided whereby workmen could ascend and descend the shaft. Therefore the Mackay Company entered into an agreement with the defendant company by which the defendant company agreed to furnish the Mackay Company, for use in painting said shaft elevator, power and operator at any time that the elevator company or the defendant company did not want them. Nothing whatever was said about the arrangement between the elevator company and the defendant company, the agreement between the Mackay and the defendant company proceeding upon the theory that the equipment and elevator were under the control of the defendant company. The Mackay Company was not to have, and in fact did not have, any control over the operator other than to direct him when to start and when to stop his elevator while thus temporarily used as a movable staging.

"Upon the day of the accident plaintiff and another workman were on the roof of the elevator touching up the walls of the shaft. They had worked down until the floor of the car was on a level with the first floor of the building. To finish the walls of the shaft between the first and second floors of the building, the space then occupied by the body of the

car, it became necessary to get under the car. To do this it was necessary for the painters to be taken to the next or second floor landing. The plaintiff was standing on the rim or ledge around the top of the car and facing the center of the car. He had a paint box and brush in his hands. The other painter was on another side of the top with his back to the plaintiff. This rim or ledge was about six and one-half inches wide. Plaintiff called to the elevator operator to take him and the other painter up to the second floor and let them off there. There was evidence before the jury that when the car had reached a point where plaintiff had directed that it be stopped the car paused and suddenly started again, throwing plaintiff off his balance, which he was unable to regain until the car had reached the fifth floor, where he was caught in the weights which passed the car at that point."

Decision of This Court in McCloskey vs. Fuller.

In reviewing these facts and affirming the judgment of the lower courts in that case, this court said:

> "It is urged that there is no sufficient averment of the negligence of this company (Fuller Company) and attention is directed to the allegation of the declaration that the plaintiff 'requested the said defendant, Otis Elevator Company, its servants and employees to stop said elevator at the second floor, so that he might get off and alight therefrom.' It is manifest, however, from the other allegations of the declaration that the plaintiff intended to charge, and did charge, negligence on the part of both defendants.
>
> * * * * * * *
>
> "The principal argument for reversal is based on the ruling of the trial court that Locke, the operator of the elevator, was the servant of the Fuller Company. The court below approved this ruling and we find no error in its conclusion. So far as Locke's employment was concerned, there was no dispute as to any matter of fact and the question of the liability of the Fuller Company for his negligence, if he was negligent in the operation of the elevator, was one of law. It cannot be said that, under the arrangement

between the Fuller Company and the Mackay Company, Locke was transferred to the employment of the latter.

* * * * * * *

"It must be concluded that the operating of the elevator under this arrangement with the Mackay Company was an operating of it by the Fuller Company.

* * * * * * *

"In the present case, the Fuller Company obtained the use of the elevator, and the operator, from the Otis Company, and paid therefor. But the Otis Company had nothing to do with the arrangement with the Mackay Company. To this transaction, and to the employing of the top of the elevator as a movable platform for the painters, the Otis Company was a stranger. The Fuller Company, having obtained the use of the elevator, agreed to supply it to the Mackay Company and undertook to furnish that company the necessary service in operating it; it asserted control for this purpose, and assumed the duty of operating with proper care."

Upon satisfying the judgment rendered against it in *McCloskey vs. the Fuller Company*, the Fuller Company instituted this action against the Otis Company which had been let out of the McCloskey case, to recover the amount paid.

Fundamental Issues of Fact and Law Raised in Both Cases Are Identical.

In this action to recover over, the Fuller Company endeavored to show, contrary to the conclusion of this court, expressed in the last above-quoted paragraph, that the Otis Company was not a stranger to the arrangement made with the Mackay Company and to the employment of the top of the elevator car as a movable platform by the painters, and also endeavored to prove by its own employees, who had testified in the original case, that what the Fuller Company hired was not the elevator, car and operator, but "elevator

service," the obvious purpose being to avoid the effect of the decision of this court in the original suit and to escape the consequences of its decision in the case of the Standard Oil Company *vs.* Anderson (212 U. S., 215), where it was held that:

> "One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation" (Op., 220).

The same evidence was before the trial court in both trials. The undisputed facts show conclusively that to the arrangement with the Mackay Company the Otis Company was a *stranger in law*, and not legally responsible for the consequences resulting from such arrangement.

The point in controversy, the issue of fact and law, the matter in dispute which was investigated, litigated and adjudicated in the original action, was: *In whose service was Locke, the elevator operator, at the time of the accident?*

The Otis Company did not contend either in the original suit or in this that Locke did not remain in its general service and subject to its general control; but it insisted, as this court held, that this general employee was transferred with the elevator car to the Fuller Company, and by the latter company for its own convenience, for its own profit, and to assist its subcontractor, the Mackay Company, was hired to the latter for an increased consideration.

The accident arose from a casual act of the operator in disobeying the instructions or signals given him regarding the movement of the car—not from any defect or insufficiency in the car or incompetency of the operator.

The evidence in the case at bar leaves no doubt that in the movement of the car Locke was subject to the orders and under the control of the Fuller Company or its subcontractor, the Mackay Company—that in making such movement he was doing their work and not the work of the Otis Company.

The assistant superintendent of the Fuller Company testified (Fisher, R., 20, 21):

> "Q. This man was sent by the Otis people to operate this elevator for your purposes, was he not?
> "A. He was the man that the Otis Elevator Company sent there to do our work, yes, sir.
> "Q. And when he was doing your work he was not doing any work for the Otis Elevator Company, was he?
> "A. Not Locke himself.
> "Q. And when he was doing your work he was subject to your orders, was he not?
> "A. In so far as what I saw he was sent there to do.
> "Q. That was simply to run the elevator up and down, was it not?
> "A. Yes, sir."

This witness also testified (R., 21) "that while the elevator was being used by the Mackay Company, Locke took his signals when to go up and when to go down, from Minte, the foreman of that company; that this painting of the shaft was a part of the contract of the Fuller Company," and that he had "told Locke to obey the order of Minte and his painters while operating said elevator," and told Locke "to observe the signals that might be given to him, and how the painters wanted the elevator operated" (R., 22).

The dominion admittedly exercised over the operator Locke by the Fuller Company is inconsistent with its present claim that it was furnished by the Otis Company with *elevator service* only.

The Contract for the Services of the Man and Use of the Machine.

In the original case counsel for the Fuller Company gave in evidence the bill rendered by the Otis Company to the Fuller Company for "one man to take care of elevator and operate same" at the rate of $3 for an eight-hour day (R., 50, 13), and it also appeared in evidence in both cases that

the Fuller Company billed the Mackay Company "for use of elevator in painting elevator shaft and tracks" at the rate of $1 an hour (R., 63, 14). Baird, the vice-president of the Fuller Company—who endeavored to show in the instant case that his company had hired "elevator service" from the Otis Company—testified regarding the transaction with Minte, of the Mackay Company, as follows:

> "Q. You turned over the elevator to him and turned over the man, did you not?
> "A. I do not think we did. I think that the service was turned over to him.
> "Q. Did you testify on the trial of the case of McCloskey against the George A. Fuller Company, in reference to your conversation with Mr. Minte and what you did, as follows:
> " 'Q. Please state what the conversation was?
> " 'A. It was not much at length. As I recall, he called at my office and stated that he wanted to have the use of the elevator at times, and wanted to know how he could arrange it. I simply told him he would have the use of it under the customary arrangements and whenever he wanted to use the elevators, if the Otis Elevator Company and ourselves were not using them he could have the use of them for any purpose he might desire, and we would charge him the customary rate.
> " 'Q. What was that?
> " 'A. I think we had rented the elevators to Mackay before at $1 an hour, the customary rate.
> " 'Q. Was anything said between you and Minte on that occasion with relation to doing the work of hoisting the elevators up and down?
> " 'A. Nothing whatever.
> " 'Q. What was the talk directed to?
> " 'A. He simply came to me and asked for the use of the elevators, and I told him that he could have it.
> " 'Q. Did that also include the operator?
> " 'A. It included everything.
> " 'Q. That is, you were to lend the elevator and the operator to the Mackay Company?
> " 'A. Yes; he had everything that went with the elevator.' "
> "Q. Did you so testify at that trial?

"A. I think so. That is practically what I mean to say now, that he had complete service of the elevator.

"Q. That you turned over the car to him and turned over the operator to the Mackay Company?

"Mr. Duvall: The witness did not say that.

"Mr. Flannery: Wait a minute. This is cross-examination and I am asking him if he said that.

"Q. (By Mr. Flannery:) It is a fact, is it not, that you turned over the car to him and turned over the elevator operator to him?

"A. The idea is——

"Q. No, never mind the idea. I want the fact, please. That is the fact, is it not?

"A. *The fact is just the same now as it was then.*

"Q. Yes.

"A. That is, that he was to have complete service for painting that shaft while the Otis Elevator Company and our company were not using the car.

"Q. In other words, you took this car which belonged to the Otis Elevator Company and you turned the car and you turned the elevator operator which you had hired from the Otis Elevator Company over to Robert E. Mackay Company, did you not?

"A. I did not understand that we hired the man, at all, Mr. Flannery. The bill does not show that. The bill shows that——

"Q. Just a moment. Can you not answer that question?

"A. That is what I am trying to do.

"Q. I am simply asking you if you did not take the car which belonged to the Otis Elevator Company and the man that you hired from the Otis Elevator Company, and turn the car and the man over to the Robert E. Mackay Company?

"A. Well, it depends upon what you mean by that.

"Q. Is not that what you testified at the trial of the case of McCloskey against the George A. Fuller Company, as I have read it to you?

"A. Yes."

(R., 15-16; also Baird's testimony in original case, R., pp. 77-79; *post* pp —.)

This testimony, showing what the Fuller Company did with the car and operator, is more eloquent than its *ex post facto* statement of its understanding of the agreement of hiring.

Baird testified at the trial of the original case that he did not recall any special arrangement with the Otis Company for the use of the car, and that he was the only one to make any such arrangement (R., 78).

Scott, the manager of the Otis Company, testified in the original case:

> "That no bill was rendered to the George A. Fuller Company for the use of the machine, for elevator service during that time; that the aforesaid invoice which his company rendered to the George A. Fuller Company for the service of a man to take care of the elevator and operate same during the months of July and August, up to and including August 9, did not cover any work which that man did for the Otis Elevator Company during the time covered by said invoice; that during the period of time covered by the aforesaid invoice, the said elevator operator was in a way subordinate to the Otis Elevator Company's foreman, who had charge of that work in the Hibbs Building, but during that time the said operator was ordered when to use the elevator for it and when not to use it, by the George A. Fuller Company's representative; that he had no knowledge of his company ordering the said Locke to do any work for his company, during the time Locke was operating the car" (R., 59).

In the case at bar there was some testimony of an inconclusive nature to show that there may have been passengers in the car at the time of the accident, but in the original case Locke, the elevator operator, testified (R., 80, 81): "At the time of the accident there were two passengers in the said elevator, but they did not say which floor they wished to go to; that the plaintiff, Mr. McCloskey, told him that he could carry the said passengers in the elevator after he first asked if he should do so; that this permission was given to him at the first floor just before the elevator was started up on

the last trip as aforesaid; that he told the plaintiff (McCloskey) then that there was a couple who wanted to go up as we went, and he said to the plaintiff, 'Can they go?' to which the plaintiff replied, 'Yes.'" (See also pp. 66 and 67, where Minte says the only passengers carried were mechanics.)

The Otis Company never questioned that Locke remained in its general service, was paid by it, was subject to its general control and to dismissal, if occasion required it. In the original case the general superintendent of the Fuller Company had testified as follows (R., 75):

> "Q. Who was the operator in charge of those elevators?
> "A. Locke.
> "Q. In whose employ was he?
> "A. In the employ of the Otis Elevator Company.
> "Q. Who paid him?
> "A. The Otis Elevator Company.
> "Q. What authority or control did you or the George A. Fuller Company have over Mr. Locke?
> "A. Not any.
> "Q. What control or authority did you have over him on the 9th day of August, 1907?
> "A. Not any.
> "Q. Had you any right to discharge Mr. Locke?
> "A. No, sir.
> "Q. Did you have any right under whatever arrangement existed between the George A. Fuller Company and the Otis Elevator Company to substitute some one else on that elevator for Mr. Locke?
> "A. No, sir."

In his brief filed in this court in the original case counsel for the Fuller Company pointed out the only question of fact and law for the decision of the court in that case in the following language:

> "In moving the elevator up and down the shaft for the accommodation of the Mackay Company, in the performance of its work, in whose service was Locke

> engaged? Who controlled and directed his movement? Whose work was he doing?"

And after reviewing the Anderson case, *supra*, he replied to his own queries as follows (p. 36):

> "Locke unquestionably was engaged in doing the work of the Mackay Company. He unquestionably was subject to the orders and directions of Mackay's painters, and we submit beyond any possible question that at the time of the accident he was the servant of the Mackay Company. If not the servant of the Mackay Company, then he must have been the servant of the Otis Company."

The same evidence as to the nature of the hiring was before the court in both trials; there was no written evidence of the contract other than that contained in the bill rendered to and paid by the Fuller Company, and the circumstances of the hiring as detailed by the Fuller Company's own witnesses were not contradicted by the Otis Company—the legal effect of their acts being the only matter in dispute. As Baird said, *supra*, *"the fact is just the same now as it was then."* The issue of fact and of law, therefore, remained identically the same in both trials, and the Otis Company moved for a directed verdict upon the grounds that the matter was *res judicata*, and that the Fuller Company was estopped from recovering in this action because the pivotal question of fact and of law had been determined in the original case of *McCloskey vs. Fuller Company* adversely to the contentions of the Fuller Company.

Decision of the Court of Appeals.

The Court of Appeals in the case at bar overruled the defense of *res judicata*, but sustained that of estoppel, holding:

> "With the status of Locke fixed in the prior case as the servant of the Fuller Company, based upon the further adjudication that the Fuller Company hired

the use of the elevator and Locke, the operator, outright, the Fuller Company is estopped by the judgment now, upon the same evidence there adduced, to shift its position in a suit for indemnity against its codefendant. The matters thus adjudicated in the former case lie at the root of the right to recover here. It is clear, therefore, that, with these matters foreclosed by the former adjudication, the foundation for the present suit is left too weak to support a right of recovery by the Fuller Company."

Short Point Involved.

Counsel for the Fuller Company devotes the greater part of his argument and authorities to a discussion of the proposition that the decision of this court in *McCloskey vs. Fuller Company* did not and could not have determined the question of the liability of the Otis Company to the Fuller Company.

While this court in that case was not called upon directly to pass on the question of the liability of the Otis Company to the Fuller Company for the negligence of the elevator operator in causing the accident, the matter of fact and of law which it adjudicated in that case is the keystone of this action for indemnity. The sole question in that case was: In whose service was Locke, the elevator operator, at the time of the accident? If he was in the service of the Otis Company, that company, of course, would be solely responsible for his negligence. If he was in the special service of the Fuller Company, although in the general employment of the Otis Company, then, under the decisions of this court, the Fuller Company alone was responsible.

If, therefore, this finding of fact and of law in the original case constitutes such a bar to the present action as to destroy the Fuller Company's right to indemnity from the Otis Company, it is a matter of no consequence whether that bar be interposed by the application of the doctrine of *res judicata*, the principles of estoppel, or the rule of *stare decisis*.

POINTS OF LAW AND AUTHORITIES.

I.

Defenses of Res Judicata and Estoppel.

By plea and also by motion made at the close of the evidence the defendant set up the defenses of *res judicata* and estoppel in bar of any recovery against it in this action (R., 103-5).

In the case of *Carmody vs. The Simpson-Sullivan Company* (43 W. L. R., 344, 345) the Court of Appeals summarized the principles announced by this court upon this subject in the following concise language:

> "It is familiar doctrine that a right, question, or fact distinctly put in issue and determined by a court of competent jurisdiction as a ground of recovery cannot be questioned in a subsequent suit between the same parties or their privies, and that even if the second suit is for a different cause of action the right, question or fact once so determined, as between the same parties or their privies, must be taken as conclusively established while the judgment in the first suit stands. S. Pac. R. Co. *vs.* United States, 168 U. S., 1; Nalle *vs.* Oyster, 230 U. S., 165. And under the rule obtaining in the Federal courts a party may take advantage of a prior adjudication either by special plea or by offering the record of that adjudication in evidence. S. Pac. R. Co. *vs.* United States, 168 U. S., 1, 59. But there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in an action between the same parties upon a different claim or demand. In the former, a judgment rendered upon the merits constitutes an absolute bar to a subsequent action. 'But where the second action between the same parties is upon a different claim or demand the judgment in the prior action operates as an

estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered.' Cromwell *vs.* County of Sac, 94 U. S., 351, 353."

See also:

Wilson's Ex'r. *vs.* Deen, 121 U. S., 525.
Stearns *vs.* Lawrence, 83 Fed. R., 734, 742.

Following the established practice as announced in the foregoing decisions and in Black on Judgments (sec. 604), the complete record in the original case of McCloskey *vs* The Fuller and Otis Companies was given in evidence.

This record, while open to explanation where ambiguous, could not be contradicted. "If the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties."

2 Black on Judgments, sec. 625.
Packet Co. *vs.* Sickles, 5 Wall., 580.

And the bar of a former judgment applies not only to what was decided, but to what might have been decided in the former action.

Virginia-Carolina Chemical Co. *vs.* Kirven, 215 U. S., 257.

"The doctrine of *res judicata* does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried—that the parties have had an adequate opportunity to say and prove all that they can in relation to it, that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated. Now these conditions are fully met when any question, though foreign to the original issue, becomes the decisive question, the turning-point in the case. In that event it will receive just as full and exhaustive an examination as if it were the sole subject-matter of a distinct

and independent suit, and therefore should be considered as much settled by the judgment as if it stood alone as the issue in the case. For these reasons, the more correct doctrine is that the estoppel covers the point which was actually litigated, and which actually determined the verdict or finding, whether it was statedly and technically in issue or not. Numerous cases incline to this view, and many attempts have been made to formulate a satisfactory statement of the true rule."

2 Black on Judgments, sec. 614, citing Bigelow on Estoppel, 3d ed., 112, and numerous other authorities.

"It often happens that some one point (such as the employment of an agent) may be put in issue in two suits between the same parties, in which, nevertheless, the causes of action are as widely different as it is possible to imagine them; and the first judgment will be held conclusive of *that point* in the second suit."

2 Black, *supra,* Sec. 610.

"The principles controlling the doctrine of *res judicata* have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions. Cromwell *vs.* Sac County, 94 U. S., 351; Lumber Co. *vs.* Buchtel, 101 U. S., 638; Stout *vs.* Lye, 103 U. S., 66; Nesbit *vs.* Riverside Independent District, 144 U. S., 610; Johnson Co. *vs.* Wharton, 152 U. S., 252; Last Chance Mining Co. *vs.* Tyler Mining Co., 157 U. S., 683."

Forsyth *vs.* Hammond, 166 U. S., 506, 518.

"Nor does it in the least affect the case that the party comes to the second trial armed with additional or different

evidence upon the same question, which he did not present when it was before in controversy. If the point was once in issue, and was actually determined by a competent court, that is enough; he is estopped."

2 Black, *supra,* Sec. 609.

Du Bois *vs.* Phila., etc., R. Co., 5 Fish. Pat. Cas., 208.

The fact that the parties were not wholly the same in both proceedings will not prevent the operation of the former judgment or decree as *res judicata.*

Green *vs.* Bogue, 158 U. S., 478, 503.

Thompson *vs.* Roberts, 24 How., 233.

The general rule that issues raised and decided between co-defendants and plaintiffs do not settle facts between such co-defendants which might have been but were not put in issue by the pleadings is subject to the well-recognized exception that where, in the course of litigation, co-plaintiffs or co-defendants do in fact, though not in form, occupy the attitude of adversaries, a judgment may be conclusive as to issues raised and determined between the parties on the same side of the question. This has long been the settled rule in chancery proceedings.

15 Ruling Case Law, Sec. 487, p. 1014.

27 L. R. A., n. s. 650, 651, and 653.

Applying the foregoing well-settled principles and putting on one side as unnecessary for consideration the question whether or not the Fuller Company and the Otis Company in the original action were adversary parties, and whether or not the causes of action set forth in the pleadings in the original suit and in this are the same—it seems to us there can be no doubt that the point in controversy, the issue of fact and law, the matter in dispute which was investigated, litigated, and adjudicated in the first action, was:

In whose service was Locke, the elevator operator, at the time of the accident?

In order to bring itself within the following language of this court in McCloskey *vs.* Fuller Company—

> "In the present case the Fuller Company obtained the use of the elevator and the operator from the Otis Company, and paid therefor. But the Otis Company had nothing to do with the arrangement with the Mackay Company. To this transaction and to the employing of the top of the elevator as a movable platform for the painters, the Otis Company was a stranger."

the Fuller Company in the instant suit endeavored to show that the Otis Company was not a stranger to the transaction with the Mackay Company, because its foreman was present on occasions and saw, or must have seen, the use made of the elevator by the painters, and that the Otis Company on other buildings had permitted such use.

But in the original suit this matter was not left to inference. Scott, the local manager of the Otis Company, testified (R., 47): "He may have seen the painters use the aforesaid elevator," and (R., 58), "that he (the witness) knew during July or August of 1907 to what use the elevators were being put by the painters for their work."

The Otis Company has never claimed that it was ignorant of these facts; it admitted them in the original case and conceded them in this. But it has always insisted, as this court determined, that to the arrangement made with the Mackay Company by the Fuller Company it was a stranger *in law;* that there was no privity of contract between them; that there was no obligation due by the Otis Company to the employees of the Mackay Company, and that its only duty to the Fuller Company was to supply a reasonably safe car and a reasonably skilful operator. That it performed its duty in this regard has not been questioned. It was established in the trial of the original case and not contro-

verted in this. The Court of Appeals, in its opinion in the original case, said:

> "It is well known that an elevator is a more or less dangerous and complicated mechanism, requiring in its operation some special knowledge and skill. The record shows that Locke possessed these qualifications" (R., 97).

II.

Defense of Stare Decisis.

McCloskey *vs.* Fuller Company a Precedent.

The Court of Appeals might have rested its decision in the case at bar upon the opinion of this court in *McCloskey vs. Fuller Company* as a *precedent* upon the question of law therein involved, the circumstances of the hiring being the same in both cases. Even as between entirely different parties, the opinion of this court upon a question of law is controlling in all subsequent controversies presenting a similar state of facts.

Judge Dillon, in his Laws and Jurisprudence, page 231, says:

> "Judicial precedent is not simply part of the law in a general sense * * * but it is a part of our law in a sense, and with effects, which are distinctively and most strikingly peculiar. The doctrine, as established, is shortly this: that a decision by a court of competent jurisdiction of a point of law lying so squarely in the pathway of judicial judgment that the case could not be adjudged without deciding it, is not only binding upon the parties to the cause in judgment, but the point so decided becomes, until it is reversed or overruled, evidence of what the law is in like cases, which the courts are bound to follow, not only in cases precisely like the one which was first determined, but also in those which, however

> different in their origin or special circumstances, stand, or are considered to stand, upon the same principles."

Again, he says (id.):

> "A point solemnly decided has the force and effect of law, binding the judges in all other cases that clearly fall within its principle, which the judges are therefore bound to follow and apply, unless, to use Blackstone's well-known and much criticised qualification, the precedent is 'flatly absurd or unjust.'"

Counsel for the Fuller Company, in his brief, says the terms of the contract between the Fuller and Otis companies regarding the hiring of Locke were not before the court in the original case (p. 13); that "in the McCloskey case there was no evidence of the Fuller-Otis contract, only the incidents of the operator's employment were in evidence; whereas in the instant case the contract between the Fuller Company and the Otis Company, for the elevator service supplied to the painters, is adduced, in addition to similar evidence of the incidents of the operator's employment" (30). He also asserts (p. 31 of his brief):

> "The Mackay Company's agreement and the mere incidents of the elevator operator's employment resulted in a determination or adjudication in the suit between McCloskey and the Fuller Company, that as between those two, the operator, as matter of law, was the servant of the latter, but, when these same incidents, which also appear in the instant suit, are viewed in the light of the additional evidence showing the contract between the Fuller Company and the Otis Company (the employer of that operator), they necessarily lead to a different but not inconsistent determination, that is, the adjudication, that as between these two litigants, where the right to indemnity alone is involved, the operator as matter of fact was the servant of the Otis Company, because it is established by the verdict of the jury that the

> Otis Company undertook to do the work of assisting the painters in the shaft. Standard Oil Co. *vs.* Anderson, 212 U. S., 215."

These statements are shown to be unfounded by extracts from the evidence contained in the brief of counsel for the petitioner (pp. 25 to 30) and other references to the record made in our statement of facts, *supra*. The only evidence of any contract or understanding between the Fuller and Otis companies is (1) that contained in the bills rendered to and paid without protest or objection by the Fuller Company; (2) the testimony of the witnesses Locke, Minte, Scott, Fisher, Baird and Gormely, herein fully reviewed, to the effect that Locke's movement of the car was directed and controlled by the Fuller Company and its subcontractor and that such movement was in aid of the work of the Fuller Company, (3) the dominion exercised over Locke by the Fuller Company in hiring him with the car, at a profit, to one of its subcontractors and otherwise directing his activities. The understanding or agreement between the two companies was as fully set forth in the original case as in this—the only thing lacking being the obvious attempt of the employees of the Fuller Company to color and distort the admitted facts by characterizing the hiring of an operator for the car as a contract for "elevator service," after this court had pointed out the distinction.

But the question in this case, as in the original case, is what the Fuller Company did, not what the representatives of that company choose to characterize it. The Otis Company billed the Fuller Company for "one man to take care of elevator and operate same" at the rate of $3 for an eight-hour day (R., 13, 50), and the Fuller Company billed the Mackay Company "for use of electric elevator in painting elevator shaft and tracks" at the rate of $1 an hour (R., 14). Baird, the vice-president of the Fuller Company, who endeavored, in the trial of the instant case, to show that they had hired "elevator service," admitted that he had testified

in the original case that Minte, the foreman of the Mackay Company, had simply asked him for the use of the elevators and he told him he could have it; that it included the elevator, the operator, and everything that went with the elevator (R., 15). At the trial of the original case, when his recollection was fresher and when there was no judgment for a substantial sum hanging over his company, Baird had testified (R., 77, 78, 79):

> "Q. It has been testified in this case that there was some arrangement made between you and the Robert E. Mackay Company relative to the use of the elevators in that building for some purpose. Do you recall any conversation with Mr. Minte on that subject? A. I recall Mr. Minte coming up to see me about it, to arrange for the elevators.
>
> "Q. Please state what the conversation was? A. It was not much at length. As I recall, he called at my office and said he wanted to have the use of the elevators at times, and wanted to know how he could arrange it. I simply told him he could have the use of them under the customary arrangement; that whenever he wanted to use the elevators, if the Otis Elevator Company or ourselves were not using them, he could have the use of them for any purpose he might desire, and we would charge him the customary rate.
>
> "Q. What was that rate? A. I think we had rented the elevators to Mackay before at one dollar an hour, the customary rate.
>
> "Q. Was anything said between you and Mr. Minte on that occasion with relation to doing the work of hoisting the elevators up and down? A. Nothing whatever.
>
> "Q. What was the talk directed to? A. He simply came to me and asked for the use of the elevators, and I told him he could have it.
>
> "Q. Did that also include the operator? A. It included everything.
>
> "That you were to lend the elevator and the operator to the Mackay Company? A. Yes; he had everything that went with the elevator.

"Q. What were the charges made for the elevator, and to whom were they made, for lending that elevator and the operator? To whom were the charges made? A. To the Robert E. Mackay Company.

"Q. What was the charge? A. One dollar per hour for all the time that he had the elevator in his use.

* * * * * * *

"Q. Now, they borrowed that elevator, its service and its operator, for a dollar an hour? A. The arrangement was just as I tried to outline it in my testimony.

"Q. Answer my question. Is that so? They were paying a dollar an hour? A. They paid a dollar an hour.

"Q. And they were borrowing it, and you were lending it? A. I don't know whether you could say they were borrowing it. They were renting it. They were paying for it."

This positive proof from its own mouthpiece of itself establishes that what the Fuller Company did was to rent the car and everything that went with it to the Mackay Company. The arrangement made by the Fuller Company with the Mackay Company was peculiarly beneficial to the Fuller Company and only incidentally aided the Mackay Company. The Fuller Company was the general contractor for the erection and completion of the entire building with the exception of the elevators. Time was of the essence of its contract (R., 76). In order to avoid delay in the work of its subcontractors, it customarily obtained the use of the elevators and their operators in buildings in course of erection by it and compelled its subcontractors to employ such elevators in hauling material and otherwise completing their work and to pay for such use. In using the elevator car as a traveling stage, the Fuller Company was not only expediting the painting of the shaft for it by the Mackay Company, but it was facilitating the work of itself and of its other subcontractors having material to be transported.

Minte, the foreman of the Mackay Company, testified regarding the elevator: "I was to turn it over to the George A. Fuller Company at any time they had any material to carry on it" (R., 65). He also said if they had used a scaffold instead of the car they would have had to shut down the elevators entirely (R., 65). Although the Mackay Company had hired the elevator by the hour, Minte testified they had to give it up constantly to enable the *Fuller Company* to carry material—Fisher, the superintendent of the Fuller Company, would come to Minte and request him to take his men off of the car so that he could have it for carrying up *his* material (R., 66). Fisher admitted this (R., 71) and testified that the elevator was used upon the same terms by another subcontractor of the Fuller Company—the Bosford-Dickinson Company, which supplied the doors and other wood trim for the building (R., 73). This very general use of the elevator by the Fuller Company for its own purposes was fully reviewed in the statement of facts made by this court in the original case, *supra*.

Counsel who now so strenuously insists that there was no transfer of Locke, sat mute when the trial justice in the original case granted the motion of counsel for the Otis Company upon the ground that there had been a transfer of Locke to the Fuller Company (R., 69). An objection from him then might have held the Otis Company in the case. As we have shown in the statement of facts, he assumed throughout the trial and in the appellate courts that the position of the Otis Company was well founded in fact and in law. After this court denied his contention that what the Fuller Company had received from the Otis Company it had passed on to the Mackay Company, he instituted this action for indemnity to compel the Otis Company to bear the whole burden of the negligence of Locke while engaged in the Fuller Company's work.

No principle of the law is better settled than that parties will not be permitted to assume successive positions, in

the course of a suit or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other or mutually contradictory.

2 Black on Judgments, sec. 632.

This court, in its opinion, in McCloskey *vs.* Fuller Company, reviewed the Anderson case, (212 U. S., 215), upon which counsel for the petitioner relies for the position he now assumes, and clearly pointed out the distinction between the employment in that case and in this. There the stevedore had not hired the winch and winchman from the defendant, his general employer, *he had agreed to pay the defendant a certain price per thousand for the hoisting* (Op., p. 203).

Upon this question of the transfer of service, the Court of Appeals not only relied upon and followed the decision of this court in the original case but also very carefully reviewed and distinguished the other pertinent authorities in the following language:

> "It having been settled that the Otis Company turned over the elevator and the operator to be used by the Fuller Company, it follows that it did not retain such control as would make it primarily liable for the accident which befell McCloskey. Eliminating the Mackay Company from responsibility, as was done in the former case, and with which we are not here concerned, we have a situation closely analogous to that presented in the case of Byrne *vs.* Kansas City, Ft. S. & M. R. R. Co., 61 Fed., 605. In that case the railway company rented its engine and crew to the Kansas City & M. R. & Bridge Company. The bridge company controlled the bridge and the operation of all trains of a number of railway lines over the bridge. The bridge company paid the railway company for the use of the engine $10 per day, and also paid the railway company the expense of fuel and supplies used in running the engine and the wages of the engineer and fireman, who were carried on the pay-rolls of the railway com-

pany. The accident happened through the negligence of the engineer in operating the engine. The question was squarely presented whether the contract by which the railway company rented its engine and crew to the bridge company relieved it from liability for negligence in the operation of the engine while in the service of the bridge company.

"On this state of facts, Judge Taft, speaking for the Circuit Court of Appeals, said: 'We are clearly of the opinion that the court was right in holding that the railway company was not responsible for the acts of the engineer and fireman in running the engine which killed Nason. They were, it is true, general servants of the railway company, but at the time of the accident they were engaged in the work of the bridge company, were subject to the orders of the bridge company's officers, and in what they did or failed to do were acting for the bridge company. The question is one of agency. The result is determined by the answer to the further questions, whose work was the servant doing, and under whose control was he doing it? The railway company had simply lent its general servants to become special or particular servants of the bridge company, had for the time parted with control over them, and was not responsible for their acts while in the service and under the control of their temporary master.' This rule is well supported by both English and American cases. Donovan *vs.* Construction Syndicate, 1 Q. B. (1893), 629; Rourke *vs.* Colliery Co., 2 C. P. Div., 205; Powell *vs.* Construction Co., 88 Tenn., 692; Miller *vs.* Railroad Co., 76 Iowa, 655; Gahagan *vs.* Aermotor Co., 67 Minn., 252; Clapp *vs.* Kemp, 122 Mass., 481.

"In Donovan *vs.* Construction Syndicate, *supra*, where defendant had rented a crane and operator to another company to be used in loading a ship at a wharf, discussing the question of primary liability, Lord Esher said: 'In this case the crane and the man to work it were lent by the defendants to Jones & Co., for a consideration, and to be used in the manner I have described. For some purposes, no doubt, the man was the servant of the defendants.

Probably, if he had let the crane get out of order by his neglect, and, in consequence, anyone was injured thereby, the defendants might be liable; but the accident in this case did not happen from that cause, but from the manner of working the crane. The man was bound to work the crane according to the orders, and under the entire and absolute control of Jones & Co. That being so, whose servant was the man in charge of the crane as to the working of it? It is true that the defendants selected the man and paid his wages, and these are circumstances which, if nothing else intervened, would be strong to show that he was the servant of the defendants. So, indeed, he was as to a great many things; but as to the working of the crane he was no longer their servant, but bound to work under the orders of Jones & Co., and if they saw the man misconducting himself in working the crane, or disobeying their orders, they would have a right to discharge him from that employment. This conclusion hardly required authority, but there is authority for it, without going back to an earlier date, in the case of Rourke *vs.* Colliery Co., 2 C. P. Div., 205.'

"In the Rourke case, Chief Justice Cockburn stated the rule as follows: 'When one person lends his servant to another for a particular employment, the servant for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him.' This rule was quoted with approval by Mr. Justice Lurton in Powell *vs.* Construction Co., *supra.*

"It is contended, however, that the Fuller Company had no power to discharge Locke, and, therefore, it cannot be held liable for his conduct. The rule of liability in cases of this sort depends upon control of the actions of the servant. In this case, it is true that Locke operated the elevator, just as the engineer operated the engine, or the man operated the crane; but when and where to operate was within the control of the Fuller Company. Here, the elevator moved upon a fixed track, as did the engines in the railway cases. Undoubtedly, if the accident

had been occasioned by a defect in the elevator, we would have a different case; but the accident was caused by the movement of the elevator, a matter within the control of the Fuller Company." (R., 117-119.)

III.

Motion for a Directed Verdict.

Upon the whole case, the defendant's motion for a directed verdict was proper and should have been granted (R., 103). Apart from the defenses hereinbefore fully discussed, the case of McCloskey *vs.* Fuller was an action against joint tort feasors, and it is well established that as an outcome of such an action there can be no recovery by one from the other except in such cases as that of the *Washington Gas Light Company vs. The District of Columbia* (161 U. S., 316), where a municipality has been compelled to answer in damages for the acts of a contractor or property owner who is primarily responsible for the negligent act producing the injury. But where the negligence of two persons unites in bringing about a result the law leaves the responsibility where it falls.

In this case, as the Supreme Court of the United States pointed out in its statement of facts, *supra*, "it is manifest * * * that the plaintiff intended to charge, and did charge, negligence on the part of both defendants" (R., 6; 228 U. S., 194). There was a failure of proof as to the defendant the Otis Company, and the judgment was rendered in its favor without objection from its codefendant, the Fuller Company.

In the leading case on this subject of *Union Stock Yards Company vs. Chicago, Burlington and Quincy Railroad Company* (196 U. S., 217) a railroad company had delivered *a car with imperfect brakes* to a terminal company, and both companies had failed to make a proper inspection to discover

the defects; an employee of the terminal company who was injured as a result of the defective brake sued the terminal company alone and recovered. In an action brought by the terminal company against the railroad company for the amount paid under the judgment it was held that as both companies were wrong-doers, and were guilty of a like neglect of duty in failing to properly inspect the car before putting it in use, the fact that such duty was first required of the railroad company did not bring the case within the exceptional rule which permits one wrong-doer, who has been mulcted in damages, to recover indemnity or contribution from another on the ground that the latter was primarily responsible. Mr. Justice Day said:

> "When two parties, acting together, commit an illegal or wrongful act the party who is held responsible for the act cannot have indemnity or contribution from the other, because both are equally culpable or *particeps criminis*, and the damage results from their joint offense."

If the railroad company could not be held liable in that case, *a fortiori* the Otis Company, which supplied a *perfect* car and competent operator, should not be mulcted in this.

IV.

Judgment of Trial Court Reversible for Other Errors in Rulings and Instructions.

The learned justice, in his oral charge, instructed the jury:

> "As between this plaintiff and this defendant, the question of agency is entirely different from the question that was presented in the other case, of McCloskey against the Fuller Company" (R., 107).

He also left it to the jury to determine as a *question of fact* whether at the time of the accident, and under the rela-

tionship existing between the Otis Company and the Fuller Company, Locke was the servant of the Otis Company and not the servant of the Fuller Company.

To these instructions of the court counsel for the defendant appropriately excepted (R., 109, 110).

It was conceded in the case at bar that the elevator operator was the general servant of the Otis Company, employed by it, paid by it, subject to dismissal by it, and under its general orders. It was also not denied that said general servant had been hired to the Fuller Company, and that the latter company paid the Otis Company for his time and for his services, and transferred both man and car for an increased consideration, with the knowledge and acquiescence of the Otis Company, to the painting subcontractor, the Mackay Company. There being no dispute or controversy regarding these essential facts, we respectfully submit that the question arising therefrom was a question of law for the court and not a question of fact for the determination of the jury.

Chief Justice Clabaugh so held in the instructions which he granted in the original case of McCloskey *vs.* Fuller, which were approved by this court.

> "So far as Locke's employment was concerned, there was no dispute as to any matter of fact, and the question of the liability of the Fuller Company for his negligence, if he was negligent, in the operation of the elevator, was one *of law*" (228 U. S., 202).

It would seem to be unnecessary to cite authority to sustain the proposition that "it is error to submit a question of law for the determination of the jury."

Reid *vs.* Anderson, 13 App. D. C., 30.
Adams *vs.* Railroad Company, 10 App. D. C., 97.

This question of law was not only submitted to the jury, but it was given to them with illustrations of the views of the court, which left the jury no alternative than to render a verdict for the plaintiff for the amount claimed.

Among the illustrations in the court's oral charge to which the defendant excepted (R., 109, 110) was the following:

> "But if you have found that Locke inside the car was not Fuller but was Otis—that is, was the agent and servant of Otis—then you have Otis inside of the car running it and Fuller on top of the car being carried. Then what is the situation; what occurs? If Fuller told him 'I want to get off at the second floor,' and Otis inside the car, instead of stopping at the second floor, only momentarily paused and then let the car go and caught Fuller on top of the car and injured him, of course Otis would be liable; Otis who was running the car on the inside would be liable to Fuller who was riding on the outside" (R., 109).

The uncontradicted evidence, hereinbefore fully reviewed, showed that the Fuller Company or its subcontractor, the Mackay Company, directed the movement of the car and that the Otis Company had no control over such movement and gave no directions regarding it (Locke, 79, 80, 81; McCloskey, 38, 41; Renner, 45; Fisher, 21, 22, 23, 70, 72, 74; Minte, 65; Scott, 59).

This instruction ignored all of this evidence in the original case and in this and told the jury that Locke—"Otis" inside of the car—was an independent agent and would be liable to "Fuller," outside of the car, for the violation of the orders which Fuller gave.

Again, the court, over the objection of the defendant (R., 107, 108), submitted the question of Locke's alleged negligence to the jury as to the defendant the Otis Elevator Company. There was no evidence that Locke was intoxicated, habitually careless, incompetent, or that he had operated the car at a reckless speed, the only evidence in the case justifying the submission of any question of negligence on his part to the jury being that he had failed to obey the orders given him regarding the movement of the car—orders which came from the Fuller Company or its subcontractor, the Mackay Company, not from the Otis Company.

The Court of Appeals found it unnecessary to consider the

assignments of error of the defendant below which are discussed herein under topics III and IV. If there were no other questions in the case, it seems to us that these exceptions to the rulings of the trial justice afford ample ground for reversing the judgment of the Supreme Court of the District of Columbia.

It is respectfully submitted that the judgment of the Court of Appeals is correct and should be affirmed, or that the writ of certiorari should be dismissed, thus leaving said judgment unaffected by the order granting the writ (Tyrrell *vs.* District of Columbia, 243 U. S., 1; Furness Withy & Co. *vs.* Insurance Association, 242 U. S., 430; San Francisco *vs.* Itsell, 133 U. S., 65).

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(35890)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 128.

GEORGE A. FULLER COMPANY, PETITIONER,

vs.

OTIS ELEVATOR COMPANY, RESPONDENT.

MEMORANDUM AS TO JURISDICTION OF THIS COURT TO REVIEW JUDGMENTS OF COURT OF APPEALS OF DISTRICT OF COLUMBIA ON CERTIORARI.

The formal judgment of the Court of Appeals in this case is as follows:

> "This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this court" (R., 121).

To review this judgment, the writ of certiorari was granted by this court under section 251 of the Judicial Code, which reads:

> "In any case in which the judgment or decree of said Court of Appeals is made *final* by the section last preceding, it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to it for its review and determination, *with the same power and authority in the case as if it had been carried by writ of error or appeal to said Supreme Court.*"

Under the settled rule of this court the judgment in the instant case is not final in form and if otherwise justifiable here, a writ of error would not lie.

Bruce, Admn., *vs.* Tobin, 245 U. S., 18.
Coe *vs.* Armour Fertilizer Works, 237 U. S., 413, 418.
Louisiana Navigation Company, Ltd., *vs.* Oyster Commission of Louisiana, 226 U. S., 99, 101.

As was said by this court in *Cincinnati Street Railway Company vs. Snell* (179 U. S., 395, 397):

> "The writ of error must be dismissed for lack of finality in the order appealed from. We have held in too many cases to justify citation that a judgment reversing a case and remanding it for a new trial or for further proceedings of a judicial character, is totally wanting in the requisite finality required to support a writ of error from this court."

While this language was used respecting a writ of error directed to the Supreme Court of a State, the rule is not otherwise where the judgment sought to be reviewed is that of the Court of Appeals of the District of Columbia.

Macfarland *vs.* Brown, 187 U. S., 239, 246.
Macfarland *vs.* Byrnes, 187 U. S., 246.
Earle *vs.* Myers, 207 U. S., 244.

The ruling in *Bruce, Admn., vs. Tobin* (*supra*), turned upon an application to this court for a writ of certiorari to review a judgment of the Supreme Court of South Dakota, which set aside the action of the trial court and directed a new trial to ascertain the amount of the respondent's share in a recovery which had been made from an interstate commerce carrier under the terms of the Federal Employers' Liability Act of 1908, questions concerning which generally speaking are reviewable by certiorari under the act of Congress of September 6, 1916, c. 448, 39 Stats., 726.

The petition for certiorari was denied on the ground that the right thereto depended essentially upon the element of finality which was wanting in the judgment there under discussion.

In the instant case, the element of finality is likewise wanting, and, as the jurisdictional power of this court to review judgments of the Court of Appeals of the District of Columbia is but coextensive with, that is the "same" as, its power and authority in cases brought before it by writ of error or appeal, neither of which would lie to a judgment in the form of that at bar, it would seem that the certiorari herein should be dismissed as having been improvidently granted.

Tyrrell *vs.* District of Columbia, 243 U. S., 1.

Furness, Withy & Co. *vs.* Yang-Tsze Ins. Ass'n, 242 U. S., 430.

See also

United States *ex Rel.* Arant *vs.* Lane, Secretary, No. 44, October Term, 1917, decided December 10, 1917.

Respectfully submitted,

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